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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Feb. 17, 2004]

Nos. 03-1429, 03-6258, 03-9571, 03-9594

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG Marketing, Inc., a Colorado corporation; American Teleservices Association,

Plaintiffs-Appellees,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellant,

and

Timothy J. Muris, Chairman of the Federal Trade Commission; Sheila F. Anthony, Commissioner, Federal Trade Commission; Mozelle W. Thompson, Commissioner, Federal Trade Commission; Orson Swindle, Commissioner, Federal Trade Commission; Thomas B. Leary, Commissioner, Federal Trade Commission; J. Howard Beales, III, Director, Bureau of Consumer Protection, in their official capacities,

Defendants.

United States of America,

Intervenor,

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New

Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming; AARP; W.J. "Billy" Tauzin, John D. Dingell, and certain other members of the House of Representatives of the United States; ACA International; Undersigned Members of the United States Senate Committee on Commerce, Science, and Transportation; The Council of American Survey Research Organizations, The American Association for Public Opinion Research, The Council for Marketing and Opinion Research,

Amici Curiae.

U.S. Security, an Oklahoma corporation; Chartered Benefit Services, Inc., an Illinois corporation, Global Contact Services, Inc., a Delaware corporation; Infocision Management Corporation, a Delaware corporation; Direct Marketing Association, Inc., a New York non-profit association,

Plaintiffs-Appellees,

v.

Federal Trade Commission,

Defendant-Appellant.

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington,

West Virginia and Wyoming; ACA International; The Council of American Survey Research Organizations, The American Association for Public Opinion Research, The Council for Marketing and Opinion Research,

Amici Curiae.

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG Marketing, Inc., a Colorado corporation; American Teleservices Association,

Petitioners,

v.

Federal Communications Commission;
United States of America,

Respondents.

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District Of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming; ACA International; The Council of American Survey Research Organizations, The American Association for Public Opinion Research, The Council for Marketing and Opinion Research,

Amici Curiae.

Competitive Telecommunications Association,

Petitioner,

v.

Federal Communications Commission;
United States of America,

Respondents.

The Council of American Survey Research Organizations, The American Association for Public Opinion Research, The Council for Marketing and Opinion Research,

Amici Curiae.

Before SEYMOUR, EBEL and HENRY, *Circuit Judges*.

EBEL, *Circuit Judge*.

The four cases consolidated in this appeal involve challenges to the national do-not-call registry, which allows individuals to register their phone numbers on a national "do-not-call list" and prohibits most commercial telemarketers from calling the numbers on that list. The primary issue in this case is whether the First Amendment prevents the government from establishing an opt-in telemarketing regulation that provides a mechanism for consumers to restrict commercial sales calls but does not provide a similar mechanism to limit charitable or political calls.[1] We hold that the do-not-call registry is a valid commercial speech regulation because it directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech. In other words, there is a reasonable fit between the do-not-call regulations and the government's reasons for enacting them.

As we discuss below in greater detail, four key aspects of the do-not-call registry convince us that it is consistent with First Amendment requirements. First, the list restricts only

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[1] The telemarketers also marshal attacks on the fees they must pay to access the national do-not-call registry and to the regulations' exception for commercial callers who have an established business relationship with the consumer. We address those alternative arguments in parts IV(A) and IV(B) below. Finally, in part IV(C), we discuss the FTC's statutory authority to enact its national do-not-call regulations.

core commercial speech--i.e., commercial sales calls.[2] Second, the do-not-call registry targets speech that invades the privacy of the home, a personal sanctuary that enjoys a unique status in our constitutional jurisprudence. *See Frisby v. Schultz*, 487 U.S. 474, 484, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Third, the do-not-call registry is an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers. Fourth, the do-not-call registry materially furthers the government's interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy, blocking a significant number of the calls that cause these problems. Under these circumstances, we conclude that the requirements of the First Amendment are satisfied.

A number of additional features of the national do-not-call registry, although not dispositive, further demonstrate that the list is consistent with the First Amendment rights of commercial speakers. The challenged regulations do not hinder any business' ability to contact consumers by other means, such as through direct mailings or other forms of advertising. Moreover, they give consumers a number of different options to avoid calls they do not want to receive. Namely, consumers who wish to restrict some but not all commercial sales calls can do so by using company-specific do-not-call lists or by granting some businesses express permission to call.[3] In addition, the government chose to offer consumers broader options to restrict commercial sales calls than charitable and political calls after finding that commercial calls were more intrusive and posed a greater

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[2] We express no opinion as to whether the do-not-call registry would be constitutional if it applied to political and charitable callers.

[3] The company-specific do-not-call regulations require that a company must respect a consumer's request not to receive calls from or on behalf of that particular business. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A); 47 C.F.R. § 64.1200(d)(3).

danger of consumer abuse. The government also had evidence that the less restrictive company-specific do-not-call list did not solve the problems caused by commercial telemarketing, but it had no comparable evidence with respect to charitable and political fundraising.

The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive. Just as a consumer can avoid door-to-door peddlers by placing a "No Solicitation" sign in his or her front yard, the do-not-call registry lets consumers avoid unwanted sales pitches that invade the home via telephone, if they choose to do so. We are convinced that the First Amendment does not prevent the government from giving consumers this option.

I. BACKGROUND

In 2003, two federal agencies--the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC)--promulgated rules that together created the national do-not-call registry. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B) (FTC rule); 47 C.F.R. § 64.1200(c)(2) (FCC rule).[4] The national do-not-call registry is a list containing the personal telephone

[4] Congress has directed the FCC to coordinate its efforts with the FTC in order to maximize consistency between the agencies' do-not-call regulations. Do-Not-Call Implementation Act, Pub.L. No. 108-10, 117 Stat. 557 (2003). Although the FTC and FCC rules are consistent in most respects, there are some situations in which a telemarketer could be subject to do-not-call restrictions under one agency's rule but exempt under the other's. *See* Federal Trade Commission, Report to Congress Pursuant to the Do-Not-Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws (2003); Federal Communications Commission, Report on Regulatory Coordination (2003). In the interest of simplicity, and because any inconsistencies between the two rules do not affect our constitutional analysis, we generally refer to both agencies' do-not-call provisions as a single regulatory measure (the do-not-call registry). When we mean to discuss the FTC rule or the FCC rule in particular, we do so explicitly.

numbers of telephone subscribers who have voluntarily indicated that they do not wish to receive unsolicited calls from commercial telemarketers.[5] Commercial telemarketers are generally prohibited from calling phone numbers that have been placed on the do-not-call registry, and they must pay an annual fee to access the numbers on the registry so that they can delete those numbers from their telephone solicitation lists. So far, consumers have registered more than 50 million phone numbers on the national do-not-call registry.

The national do-not-call registry's restrictions apply only to telemarketing calls made by or on behalf of sellers of goods or services, and not to charitable or political fundraising calls. 16 C.F.R. §§ 310.4(b)(1)(iii)(B), 310.6(a); 47 C.F.R. §§ 64.1200(c)(2), 64.1200(f)(9).[6] Additionally, a seller may call consumers who have signed up for the national registry if it has an established business relationship with the consumer or if the consumer has given that seller express written permission to call. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i-ii); 47 C.F.R. § 64.1200(f)(9)(i-ii).[7] Telemarketers

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[5] Consumers can register their personal phone numbers for the do-not-call list either by phone or online.

[6] There has been some confusion throughout this litigation with respect to how to define the term "telemarketing." *Compare* Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, Pub.L. No. 103-297, 108 Stat. 1545 at §§ 7 (1994) ("Telemarketing Act") (defining "telemarketing" as calls "conducted to induce purchases of goods or services") *with Mainstream Mktg. Servs., Inc. v. FTC*, 283 F.Supp.2d 1151, 1154 (D.Colo.2003) (describing "telemarketing" as the practice of "soliciting sales and donations" conducted by businesses, charities, political organizations, and others). Unless otherwise indicated, we use the term "telemarketing" to refer to commercial sales calls made to induce purchases of goods or services (not charitable or political fundraising) consistent with Congress' definition in the Telemarketing Act.

[7] The "established business relationship" exception allows businesses to call customers with whom they have conducted a financial transaction or to whom they have sold, rented, or leased goods or services within 18 months of the telephone call. 47 C.F.R. § 64.1200(f)(3); Telemarketing

generally have three months from the date on which a consumer signs up for the registry to remove the consumer's phone number from their call lists. 16 C.F.R. § 310.4(b)(3)(iv); 47 C.F.R. § 64.1200(c)(2)(i)(D). Consumer registrations remain valid for five years, and phone numbers that are disconnected or reassigned will be periodically removed from the registry. 47 C.F.R § 64.1200(c)(2); Telemarketing Sales Rule, Statement of Basis and Purpose, 68 Fed.Reg. 4580, 4640 (Jan. 29, 2003).

The national do-not-call registry is the product of a regulatory effort dating back to 1991 aimed at protecting the privacy rights of consumers and curbing the risk of telemarketing abuse. *See generally FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 857-58 (10th Cir.2003). In the Telephone Consumer Protection Act of 1991 ("TCPA")--under which the FCC enacted its do-not-call rules--Congress found that for many consumers telemarketing sales calls constitute an intrusive invasion of privacy. *See* Pub.L. No. 102-243, 105 Stat. 2394 at § 2 (1991). Moreover, the TCPA's legislative history cited statistical data indicating that "most unwanted telephone solicitations are commercial in nature" and that "unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R.Rep. No. 102-317 at 16 (1991). The TCPA therefore authorized the FCC to establish a national database of consumers who object to receiving "telephone

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Sales Rule, Statement of Basis and Purpose, 68 Fed.Reg. 4580, 4591 (Jan. 29, 2003). Additionally, sellers can call consumers on the national do-not-call registry within three months after the consumer makes an inquiry or application. 47 C.F.R § 64.1200(f)(3). A seller who has an established business relationship with a consumer is still bound to comply with the company-specific rules if the consumer requests not to be called. *Id.* at § 64.1200(f)(3)(i).

solicitations," which the act defined as commercial sales calls. Pub.L. No. 102-243, 105 Stat. 2394 at § 3.[8]

Furthermore, in the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 ("Telemarketing Act")--under which the FTC enacted its do-not-call rules--Congress found that consumers lose an estimated $40 billion each year due to telemarketing fraud. *See* Pub.L. No. 103-297, 108 Stat. 1545 at § 2 (1994). Therefore, Congress authorized the FTC to prohibit sales calls that a reasonable consumer would consider coercive or abusive of his or her right to privacy. *Id.* at § 3.

The FCC and FTC initially sought to accomplish the goals of the TCPA and the Telemarketing Act by adopting company-specific do-not-call lists, requiring sellers to maintain lists of consumers who have requested not to be called by that particular solicitor, and requiring telemarketers to honor those requests. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752 at ¶ 23-24 (Sept. 17, 1992); Telemarketing Sales Rule, Statement of Basis and Purpose, 60 Fed.Reg. 43842, 43854-55 (Aug. 23, 1995). Yet in enacting the national do-not-call registry, the agencies concluded that the company-specific lists had failed to achieve Congress' objectives. *See* Telemarketing Sales Rule, Statement of Basis and Purpose, 68 Fed Reg. 4580, 4629, 4631 (Jan. 29, 2003); Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed.Reg. 44144, 44144-45 (July 25, 2003). Among other shortfalls, the agencies explained that the large number of possible telephone solicitors made it burdensome for consumers to assert

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[8] The TCPA defines a "telephone solicitation" as a "telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services," excluding, inter alia, calls from tax exempt nonprofit organizations. Pub.L. No. 103-297, 108 Stat. 1545 at § 3.

their rights under the company-specific rules, and that commercial telemarketers often ignored consumers' requests not to be called. 68 Fed.Reg. at 4629. Accordingly, the agencies decided to keep the company-specific rules as an option available to consumers, but to supplement them with the national do-not-call registry. *Id.*; 68 Fed.Reg. at 44144.

In this appeal we have consolidated four cases challenging various aspects of the national do-not-call registry.[9] Cases Nos. 03-1429, 03-6258 and 03-9571 involve First Amendment attacks on the do-not-call list and its registry fees. We address these issues in parts III and IV(A) respectively. Case No. 03-9594 involves a challenge to the FCC rule's established business relationship exception on administrative law grounds. We address this issue in part IV(B). Finally, in part IV(C), we address the alternative argument that the FTC lacked statutory authority to enact its do-not-call regulations, an argument that the district court relied upon in case No. 03-6258. We conclude that all of the telemarketers' challenges lack merit and we uphold the do-not-call list in its entirety.

II. STANDARD OF REVIEW

The constitutionality of the national do-not-call registry and its fees under the First Amendment are questions of law

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[9] Case No. 03-1429 reaches us on appeal from the District of Colorado, which held that the FTC's do-not-call rules were unconstitutional on First Amendment grounds. In that case, the district court enjoined the FTC from implementing the do-not-call registry. We stayed that injunction, pending our review on the merits, in *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850 (10th Cir.2003). Case No. 03-6258 reaches us on appeal from the Western District of Oklahoma, which held that the FTC lacked the statutory authority to enact its do-not-call rules. In that case, the court also approved certain unrelated aspects of the Telemarketing Sales Rule, and the portions of its decision addressing those issues are not before us on appeal. In cases No. 03-9571 and No. 03-9594, we review the FCC order directly pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

we review de novo. *See Phelan v. Laramie County Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246 (10th Cir.2000). We review whether the FCC's decision to include an established business relationship exception violated the Administrative Procedure Act under the arbitrary and capricious standard. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir.1997). Finally, we review de novo a district court's decision that an agency lacked authority under the controlling statute to act, keeping in mind that the courts owe deference to a federal agency's interpretation of a statute it administers. *See Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 824 (10th Cir.2000) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842- 43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

III. FIRST AMENDMENT ANALYSIS

The national do-not-call registry's telemarketing restrictions apply only to commercial speech. Like most commercial speech regulations, the do-not-call rules draw a line between commercial and non-commercial speech on the basis of content. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n. 11, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("If commercial speech is to be distinguished, it must be distinguished by its content."); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (same). In reviewing commercial speech regulations, we apply the *Central Hudson* test. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416, 429-30, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (noting that the challenged law drew content-based distinctions between commercial and non-commercial speech and applying more lenient scrutiny under *Central Hudson*); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634-35, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) ("This case . . . concerns pure commer-

cial advertising, for which we have always reserved a lesser degree of protection under the First Amendment."); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir.1994) (content-based regulations disadvantaging commercial speech are reviewed pursuant to the lesser degree of First Amendment protection provided in *Central Hudson*).

Central Hudson established a three-part test governing First Amendment challenges to regulations restricting non-misleading commercial speech that relates to lawful activity. First, the government must assert a substantial interest to be achieved by the regulation. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. 2343. Second, the regulation must directly advance that governmental interest, meaning that it must do more than provide "only ineffective or remote support for the government's purpose." *Id.* Third, although the regulation need not be the least restrictive measure available, it must be narrowly tailored not to restrict more speech than necessary. *See id.; Board of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Together, these final two factors require that there be a reasonable fit between the government's objectives and the means it chooses to accomplish those ends. *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).

The government bears the burden of asserting one or more substantial governmental interests and demonstrating a reasonable fit between those interests and the challenged regulation. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir.2001). The government is not limited in the evidence it may use to meet its burden. For example, a commercial speech regulation may be justified by anecdotes, history, consensus, or simple common sense. *Went For It*, 515 U.S. at 628, 115 S.Ct. 2371. Yet we may not take it upon ourselves to supplant the interests put forward by the state with our own ideas of what goals the

challenged laws might serve. *Edenfield v. Fane*, 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

A. Governmental Interests

The government asserts that the do-not-call regulations are justified by its interests in 1) protecting the privacy of individuals in their homes, and 2) protecting consumers against the risk of fraudulent and abusive solicitation. *See* 68 Fed.Reg. 44144; 68 Fed.Reg. at 4635. Both of these justifications are undisputedly substantial governmental interests.

In *Rowan v. United States Post Office Dep't*, the Supreme Court upheld the right of a homeowner to restrict material that could be mailed to his or her house. 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). The Court emphasized the importance of individual privacy, particularly in the context of the home, stating that "the ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." *Id.* at 737, 90 S.Ct. 1484. In *Frisby v. Schultz*, the Court again stressed the unique nature of the home and recognized that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." 487 U.S. 474, 484, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980)). As the Court held in *Frisby:*

> One important aspect of residential privacy is protection of the unwilling listener. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. at 484-85, 108 S.Ct. 2495 (citations omitted). Likewise, in *Hill v. Colorado*, the Court called the unwilling listener's

interest in avoiding unwanted communication part of the broader right to be let alone that Justice Brandeis described as "the right most valued by civilized men." 530 U.S. 703, 716-17, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)). The Court added that the right to avoid unwanted speech has special force in the context of the home. *Id.; see also FCC v. Pacifica Found.*, 438 U.S. 726, 748, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

Additionally, the Supreme Court has recognized that the government has a substantial interest in preventing abusive and coercive sales practices. *Edenfield v. Fane*, 507 U.S. 761, 768-69, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("[T]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.") (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)).

B. Reasonable Fit

A reasonable fit exists between the do-not-call rules and the government's privacy and consumer protection interests if the regulation directly advances those interests and is narrowly tailored. *See Central Hudson*, 447 U.S. at 564-65, 100 S.Ct. 2343. In this context, the "narrowly tailored" standard does not require that the government's response to protect substantial interests be the least restrictive measure available. All that is required is a proportional response. *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

In other words, the national do-not-call registry is valid if it is designed to provide effective support for the government's

purposes and if the government did not suppress an excessive amount of speech when substantially narrower restrictions would have worked just as well. *See Central Hudson*, 447 U.S. at 564-65, 100 S.Ct. 2343. These criteria are plainly established in this case. The do-not-call registry directly advances the government's interests by effectively blocking a significant number of the calls that cause the problems the government sought to redress. It is narrowly tailored because its opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener.

1. Effectiveness

The telemarketers assert that the do-not-call registry is unconstitutionally underinclusive because it does not apply to charitable and political callers. First Amendment challenges based on underinclusiveness face an uphill battle in the commercial speech context. As a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front. *United States v. Edge Broad. Co.*, 509 U.S. 418, 434, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." *Id.* The underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *see also Central Hudson*, 447 U.S. at 564, 100 S.Ct. 2343 ("If a regulation "provides only ineffective or remote support for the government's purpose" it cannot be said to bear a reasonable fit with that purported objective"). *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (underinclusiveness provides a basis for a First Amendment claim when it constitutes an "attempt

to give one side of a debatable public question an advantage in expressing its views to the people").

In *Rubin*, for example, the Supreme Court struck down a law prohibiting brewers from putting the alcohol content of their product on beer labels, purportedly in an effort to discourage "strength wars." 514 U.S. at 478, 115 S.Ct. 1585. However, the law allowed advertisements disclosing the alcohol content of beers, allowed sellers of wines and spirits to disclose alcohol content on labels (and even required such disclosure for certain wines), and allowed brewers to signal high alcohol content by using the term "malt liquor." *Id.* at 488-89, 115 S.Ct. 1585. Under these circumstances, the Court concluded that there was little chance that the beer label rule would materially deter strength wars in light of the "irrationality of this unique and puzzling regulatory framework." *Id.* at 489, 115 S.Ct. 1585.

Likewise, in *City of Cincinnati v. Discovery Network*, the Court struck down a law prohibiting commercial newsracks on public property, purportedly in order to promote the safety and attractive appearance of its streets and sidewalks. 507 U.S. 410, 412, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). However, the ban applied to only 62 of the 1,500 to 2,000 newsracks in the city, thus addressing only a "minute" and "paltry" share of the problem. *Id.* at 417-18, 113 S.Ct. 1505. Moreover, the challenged ordinance was not enacted in an effort to address problems posed by newsracks, but was actually an "outdated prohibition against the distribution of any commercial handbills on public property . . . enacted long before any concern about newsracks developed." *Id.* For these reasons, the Court held in part II of that opinion that "the city did not establish the reasonable fit we require." *Id.* at 417-18, 113 S.Ct. 1505.

Yet so long as a commercial speech regulation materially furthers its objectives, underinclusiveness is not fatal under *Central Hudson*. For example, in *Edge Broadcasting* the

Supreme Court approved a regulation that prohibited broadcasters in North Carolina (which did not permit lotteries) from broadcasting lottery advertisements on the radio, even as applied to a broadcaster located near the border of Virginia (where lotteries were legal) whose audience consisted of 92.2 percent Virginians. 509 U.S. 418, 423-24, 431-33, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). The Court found it determinative that the regulation prevented lottery ads from reaching about 127,000 North Carolina residents (7.8 percent of Edge's listeners):[10]

> It could hardly be denied . . . that these facts, standing alone, would clearly show that applying the statutory restriction to Edge would directly serve the statutory purpose of supporting North Carolina's antigambling policy. . . . [T]his result could hardly be called either "ineffective," "remote," or "conditional." Nor could it be called only "limited incremental support" for the Government interest.

Id. at 432, 113 S.Ct. 2696 (citations omitted). The Court rejected Edge's argument that the regulations banning lottery advertising by in-state radio failed materially to advance the government's interests because North Carolina residents were already inundated with lottery advertising from other sources, such as Virginia radio and television programs. *Id.* at 434-35, 113 S.Ct. 2696. "[T]he Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated." *Id.* at 434, 113 S.Ct. 2696; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[P]rohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the

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[10] In the North Carolina counties Edge served, its broadcasts accounted for about 11 percent of all radio listening. *Edge Broad.*, 509 U.S. at 431-32, 113 S.Ct. 2696.

fact that the ordinance is underinclusive because it permits onsite advertising.").

As discussed above, the national do-not-call registry is designed to reduce intrusions into personal privacy and the risk of telemarketing fraud and abuse that accompany unwanted telephone solicitation. The registry directly advances those goals. So far, more than 50 million telephone numbers have been registered on the do-not-call list, and the do-not-call regulations protect these households from receiving most unwanted telemarketing calls. According to the telemarketers' own estimate, 2.64 telemarketing calls per week--or more than 137 calls annually--were directed at an average consumer before the do-not-call list came into effect. *Cf.* 68 Fed.Reg. at 44152 (discussing the five-fold increase in the total number of telemarketing calls between 1991 and 2003). Accordingly, absent the do-not-call registry, telemarketers would call those consumers who have already signed up for the registry an estimated total of 6.85 *billion* times each year.

To be sure, the do-not-call list will not block all of these calls. Nevertheless, it will prohibit a substantial number of them, making it difficult to fathom how the registry could be called an "ineffective" means of stopping invasive or abusive calls, or a regulation that "furnish[es] only speculative or marginal support" for the government's interests. *See also id.* (noting the effectiveness of state do-not-call lists in reducing unwanted telemarketing calls).[11]

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[11] It is unclear from the record exactly how many telemarketing calls will be blocked by the do-not-call regulations. Most significantly, we have not been provided with data as to how many of these unsolicited sales calls would be permissible under the established business relationship exception. In applying *Central Hudson,* however, we are entitled to rely on anecdotal evidence and make the common sense observation that the do-not-call list will apply to a substantial number of telemarketing calls. *See Went For It,* 515 U.S. at 628, 115 S.Ct. 2371; *cf.* 68 Fed.Reg. at 44153-54 (suggesting that the volume of calls exempted under the

Furthermore, the do-not-call list prohibits not only a significant *number* of commercial sales calls, but also a significant *percentage* of all calls causing the problems that Congress sought to address (whether commercial, charitable or political). The record demonstrates that a substantial share of all solicitation calls will be governed by the do-not-call rules. *See* H.R.Rep. No. 102-317, at 16 (1991) ("[M]ost unwanted telephone solicitations are commercial in nature."); 68 Fed.Reg. at 44153-54 (the high volume and unexpected nature of commercial calls subject to the national do-not-call registry makes those calls more problematic than nonprofit calls and solicitations based on established business relationships).

The telemarketers asserted before the FTC that they might have to lay off up to 50 percent of their employees if the national do-not-call registry came into effect. *See* 68 Fed. Reg. at 4631. It is reasonable to conclude that the telemarketers' planned reduction in force corresponds to a decrease in the amount of calls they will make. Significantly, the percentage of *unwanted* calls that will be prohibited will be even higher than the percentage of all unsolicited calls blocked by the list. The individuals on the do-not-call list have declared that they do not wish to receive unsolicited commercial telemarketing calls, whereas those who do want to continue receiving such calls will not register. *Cf.* 68 Fed.Reg. at 4632 (under the national do-not-call regulations, "telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object").

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established business relationship exception most likely will be relatively low compared to the volume of calls subject to the do-not-call restrictions); 68 Fed.Reg. at 4631 (noting that telemarketers expect to lay off up to half of their employees in response to the do-not-call regulations).

Finally, the type of unsolicited calls that the do-not-call list does prohibit--commercial sales calls--is the type that Congress, the FTC and the FCC have all determined to be most to blame for the problems the government is seeking to redress. According to the legislative history accompanying the TCPA, "[c]omplaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R.Rep. No. 102-317, at 16 (1991) (noting that non-commercial calls were less intrusive to consumers' privacy because they are more expected and because there is a lower volume of such calls); *see also* 68 Fed.Reg. at 44153. Similarly, the FCC determined that calls from solicitors with an established business relationship with the recipient are less problematic than other commercial calls. 68 Fed.Reg. at 44154 ("Consumers are more likely to anticipate contacts from companies with whom they have an existing relationship and the volume of such calls will most likely be lower.").

Additionally, the FTC has found that commercial callers are more likely than non-commercial callers to engage in deceptive and abusive practices. 68 Fed.Reg. at 4637 ("When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter."). Specifically, the FTC concluded that in charitable and political calls, a significant purpose of the call is to sell a cause, not merely to receive a donation, and that non-commercial callers thus have stronger incentives not to alienate the people they call or to engage in abusive and deceptive practices. *Id.; cf. Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) ("[B]ecause charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it is not dealt with as a variety of purely commercial speech."). The speech

regulated by the do-not-call list is therefore the speech most likely to cause the problems the government sought to alleviate in enacting that list, further demonstrating that the regulation directly advances the government's interests.

In sum, the do-not-call list directly advances the government's interests--reducing intrusions upon consumer privacy and the risk of fraud or abuse--by restricting a substantial number (and also a substantial percentage) of the calls that cause these problems. Unlike the regulations struck down in *Rubin* and *Discovery Network*, the do-not-call list is not so underinclusive that it fails materially to advance the government's goals.

2. Narrow Tailoring

Although the least restrictive means test is not the test to be used in the commercial speech context, commercial speech regulations do at least have to be "narrowly tailored" and provide a "reasonable fit" between the problem and the solution. Whether or not there are "numerous and obvious less-burdensome alternatives" is a relevant consideration in our narrow tailoring analysis. *Went For It*, 515 U.S. at 632, 115 S.Ct. 2371. A law is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Accordingly, we consider whether there are numerous and obvious alternatives that would restrict less speech and would serve the government's interest as effectively as the challenged law. *See Central Hudson*, 447 U.S. at 565, 100 S.Ct. 2343; *Edge Broad.*, 509 U.S. at 430, 113 S.Ct. 2696.

We hold that the national do-not-call registry is narrowly tailored because it does not over-regulate protected speech; rather, it restricts only calls that are targeted at unwilling recipients. *Cf. Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("There simply is no right to

force speech into the home of an unwilling listener."); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970) ("We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another."). The do-not-call registry prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls and for whom such calls would constitute an invasion of privacy. *See Hill v. Colorado*, 530 U.S. 703, 716-17, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (the right of privacy includes an unwilling listener's interest in avoiding unwanted communication).

The Supreme Court has repeatedly held that speech restrictions based on private choice (i.e.--an opt-in feature) are less restrictive than laws that prohibit speech directly. In *Rowan*, for example, the Court approved a law under which an individual could require a mailer to stop all future mailings if he or she received advertisements that he or she believed to be erotically arousing or sexually provocative. 397 U.S. at 729-30, 738, 90 S.Ct. 1484. Although it was the government that empowered individuals to avoid materials they considered provocative, the Court emphasized that the mailer's right to communicate was circumscribed only by an affirmative act of a householder. *Id.* at 738, 90 S.Ct. 1484. "Congress has erected a wall--or more accurately permits a citizen to erect a wall--that no advertiser may penetrate without his acquiescence. . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." *Id.*

Likewise, in rejecting direct prohibitions of speech (even fully protected speech), the Supreme Court has often reasoned that an opt-in regulation would have been a less restrictive alternative. In *Martin v. City of Struthers*, the Court struck down a city ordinance prohibiting door-to- door canvassing, noting that the government's interest could have

been achieved in a less restrictive manner by giving householders the choice of whether or not to receive visitors. 319 U.S. 141, 147-49, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) ("[T]he decision as to whether distributers of literature may lawfully call at a home . . . belongs . . . with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant.").[12] More recently, in *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, the Court struck down a permit requirement for door-to-door advocacy, while noting that another section of the ordinance allowing residents to post "No Solicitation" signs provided ample protection for the unwilling listener. 536 U.S. 150, 153, 168-69, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); *see also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 639, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) ("[T]he provision permitting homeowners to bar solicitors from their property by posting signs reading 'No Solicitors or Peddlers Invited' suggests the availability of less intrusive and more effective measures to protect privacy.") (citations omitted).

The idea that an opt-in regulation is less restrictive than a direct prohibition of speech applies not only to traditional door-to-door solicitation, but also to regulations seeking to protect the privacy of the home from unwanted intrusions via telephone, television, or the Internet. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (opt-in targeted blocking of offensive television programming "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners. . . .

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[12] The Court in *Martin* suggested that one kind of regulation of home solicitation that would pass constitutional muster would be a regulation "which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed." 319 U.S. at 148, 63 S.Ct. 862.

Simply put, targeted blocking is less restrictive than banning . . . . ."); *cf. Reno v. ACLU*, 521 U.S. 844, 860, 879, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (striking down an absolute prohibition against making certain sexually explicit material available to minors on the Internet on the grounds that it curtailed the speech of adults, contrasting that regulation with the alternative of facilitating parental control of such material).

Like the do-not-mail regulation approved in *Rowan*, the national do-not-call registry does not itself prohibit any speech. Instead, it merely "permits a citizen to erect a wall . . . that no advertiser may penetrate without his acquiescence." *See Rowan*, 397 U.S. at 738, 90 S.Ct. 1484. Almost by definition, the do-not-call regulations only block calls that would constitute unwanted intrusions into the privacy of consumers who have signed up for the list. Moreover, it allows consumers who feel susceptible to telephone fraud or abuse to ensure that most commercial callers will not have an opportunity to victimize them. Under the circumstances we address in this case, we conclude that the do-not-call registry's opt-in feature renders it a narrowly tailored commercial speech regulation.

The do-not-call registry's narrow tailoring is further demonstrated by the fact that it presents both sellers and consumers with a number of options to make and receive sales offers. From the seller's perspective, the do-not-call registry restricts only one avenue by which solicitors can communicate with consumers who have registered for the list. In particular, the do-not-call regulations do not prevent businesses from corresponding with potential customers by mail or by means of advertising through other media. *Cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 633-34, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (holding a 30-day post-accident ban on attorney solicitations narrowly tailored, finding it relevant that ample alternative channels for advertising legal services were available).

From the consumer's perspective, the do-not-call rules provide a number of different options allowing consumers to dictate what telemarketing calls they wish to receive and what calls they wish to avoid. Consumers who would like to receive some commercial sales calls but not others can sign up for the national do-not-call registry but give written permission to call to those businesses from whom they wish to receive offers. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B)(*i*); 47 C.F.R. § 64.1200(f)(9)(i). Alternatively, they may decline to sign up on the national registry but make company-specific do-not-call requests with those particular businesses from whom they do not wish to receive calls. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A); 47 C.F.R. § 64.1200(d)(3). Therefore, under the current regulations, consumers choose between two default rules--either that telemarketers may call or that they may not. Then, consumers may make company-specific modifications to either of these default rules as they see fit, either granting particular sellers permission to call or blocking calls from certain sellers.

Finally, none of the telemarketers' proposed alternatives would serve the government's interests as effectively as the national do-not-call list. Primarily, the telemarketers suggest that company-specific rules effectively protected consumers. Yet as the FTC found, "[t]he record in this matter overwhelmingly shows the contrary . . . it shows that the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer." 68 Fed.Reg. at 4631.

First, the company-specific approach proved to be extremely burdensome to consumers, who had to repeat their do-not-call requests to every solicitor who called. *Id.* at 4629. In effect, this system gave solicitors one free chance to call each consumer, although many consumers find even an initial unsolicited sales call abusive and invasive of privacy. *Id.* at 4629-30; *cf. FCC v. Pacifica Found.*, 438 U.S. 726, 748-49,

98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not . . . avoid a harm that has already taken place."). Second, the government's experience under the company-specific rules demonstrated that commercial solicitors often ignored consumers' requests to be placed on their company-specific lists. 68 Fed.Reg. at 4629. Third, consumers have no way to verify whether their numbers have been removed from a solicitor's calling list in response to a company-specific do-not-call request. *Id.* Finally, company-specific rules are difficult to enforce because they require consumers to bear the evidentiary burden of keeping lists detailing which telemarketers have called them and what do-not-call requests they have made. *Id.*

The telemarketers' objection that the company-specific approach should have been more vigorously marketed to consumers is unavailing because the flaws the FTC identified are inherent in the company-specific rule. More consumer education simply could not have cured the ineffectiveness of the former system. Similarly, even if we were to agree with the telemarketers' argument that violations of the company-specific list were not adequately enforced, the national do-not-call program improves upon failures of the company-specific approach that were not caused by any lack of enforcement. Unlike the national registry, the company-specific approach gave a vast number of potential solicitors one shot at each unwilling consumer and was significantly more difficult for consumers to use. Moreover, the national do-not-call registry will be easier to enforce than the company-specific rules because there will generally be no dispute as to whether a certain telemarketer is prohibited from calling a particular number.

Finally, the telemarketers argue that it would have been less restrictive to let consumers rely on technological alternatives--such as caller ID, call rejection services, and electronic devices designed to block unwanted calls. Each of these alternatives puts the cost of avoiding unwanted telemarketing calls on consumers. Furthermore, as the FCC found, "[a]lthough technology has improved to assist consumers in blocking unwanted calls, it has also evolved in such a way as to assist telemarketers in making greater numbers of calls and even circumventing such blocking technologies." 68 Fed.Reg. at 44147. Forcing consumers to compete in a technological arms race with the telemarketing industry is not an equally effective alternative to the do-not-call registry.

In sum, the do-not-call registry is narrowly tailored to restrict only speech that contributes to the problems the government seeks to redress, namely the intrusion into personal privacy and the risk of fraud and abuse caused by telephone calls that consumers do not welcome into their homes. No calls are restricted unless the recipient has affirmatively declared that he or she does not wish to receive them. Moreover, telemarketers still have the ability to contact consumers in other ways, and consumers have a number of different options in determining what telemarketing calls they will receive. Finally, there are not numerous and obvious less-burdensome alternatives that would restrict less speech while accomplishing the government's objectives equally as well.

C. Discovery Network

As should be clear from the foregoing discussion, the telemarketers' reliance on *Discovery Network* is misplaced. In *Discovery Network,* the Supreme Court applied *Central Hudson* to strike down a municipal policy directly prohibiting freestanding commercial newsracks on public property. 507 U.S. at 412, 416, 113 S.Ct. 1505. It concluded that the regulation--which did not similarly restrict non-commercial

newsracks--did not bear a reasonable fit to the city's interests in promoting safety and the attractive appearance of the city's public areas. *Id.* at 412, 417, 113 S.Ct. 1505. In particular, the Court emphasized that 1) the regulation applied to only a "minute" and "paltry" share of the total number of newsracks in the city, *id.* at 418, 113 S.Ct. 1505, and 2) the regulation's distinction between commercial and non-commercial speech bore "no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424, 113 S.Ct. 1505 (emphasis in original).

The trifling number of newsracks regulated in *Discovery Network* suggested that the policy did not materially advance the city's interests, and this aspect of the regulation was not justified by evidence demonstrating that despite their small numbers the commercial newsracks disproportionately caused the problems the city sought to remedy. The Court held, in essence, that a regulation that has only a minimal impact on the identified problem cannot be saved simply because it targets only commercial speech, which occupies a lower place in our First Amendment jurisprudence. The Court concluded that the "low value" of commercial speech was "an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, *and* have only a minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418, 113 S.Ct. 1505 (emphasis added). Under a straightforward application of *Central Hudson*, the Court struck down the city's newsrack ordinance because it failed directly to advance the city's interests.

Both of the factors the Court emphasized in *Discovery Network* are absent in our case. First, while the regulation in *Discovery Network* applied only to a minute and paltry number of newsracks, the do-not-call registry blocks a substantial amount of unwanted telemarketing calls. *See supra* part III(B)(1). Second, while the distinction between

commercial and non-commercial speech in *Discovery Network* bore no relationship whatsoever to the city's as serted interests, the do-not-call registry's commercial/non-commercial distinction was based on findings that commercial telephone solicitation was significantly more problematic than charitable or political fundraising calls. *Id.; see also FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 856-60 (10th Cir.2003). Additionally, the government had evidence that other alternatives (company-specific restrictions) failed in the commercial context, but had no comparable experience involving the failure of company-specific restrictions with respect to charitable or political callers. *See supra* part III(B)(2); 68 Fed.Reg. at 4637.

D. Summary

For the reasons discussed above, the government has asserted substantial interests to be served by the do-not-call registry (privacy and consumer protection), the do-not-call registry will directly advance those interests by banning a substantial amount of unwanted telemarketing calls, and the regulation is narrowly tailored because its opt-in feature ensures that it does not restrict any speech directed at a willing listener. In other words, the do-not-call registry bears a reasonable fit with the purposes the government sought to advance. Therefore, it is consistent with the limits the First Amendment imposes on laws restricting commercial speech.[13]

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[13] Our conclusion is consistent with other circuits' decisions approving similar telecommunications regulations. *See Missouri v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir.2003) (upholding TCPA regulation prohibiting unsolicited commercial fax advertising); *Destination Ventures, Ltd., v. FCC*, 46 F.3d 54 (9th Cir.1995) (same); *Moser v. FCC*, 46 F.3d 970, 972-75 (9th Cir.1995) (upholding ban on prerecorded commercial telemarketing).

IV. OTHER ISSUES

The telemarketers also challenge various other aspects of the do-not-call registry. In turn, we consider 1) whether the fees telemarketers must pay to access the registry are constitutional, 2) whether it was arbitrary and capricious for the FCC to approve the established business relationship exception, and 3) whether the FTC had statutory authority to enact its do-not- call rules.[14]

A. The Do-Not-Call Registry Fees

To obtain the phone numbers of consumers who have signed up for the national do-not-call registry, telemarketers must pay a modest annual access fee determined by the FTC. Currently, the fee is $25 per area code of data, except that the first five area codes are provided free of charge and the maximum annual fee is capped at $7,375. 16 C.F.R. § 310.8(c). The telemarketers argue that this fee unconstitutionally imposes a revenue tax on protected speech. We disagree.

It is well-established that the First Amendment protects against the imposition of charges, such as a license taxes, for the enjoyment of free speech rights. *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Nevertheless, the government is permitted to exact a fee in order to defray the cost of legitimate regulations, even though such a fee incidentally burdens speech. *See id.* at 114

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[14] The telemarketers' challenge to the do-not-call registry fees was raised below in case No. 03-1429, although the district court did not reach this issue. The challenge to the FCC's established business relationship exception has been raised only in case No. 03-9594, in which we review the FCC action directly. The telemarketers' challenge to the FTC's statutory authority to enact its do-not-call regulations was raised below in case Nos. 03-1429 and 03-6258. In case No. 03-1429, the district court declined to reach this issue; in case No. 03-6258, the district court held that the FTC lacked statutory authority.

n. 8, 63 S.Ct. 870. In *Murdock,* for example, the Court struck down an ordinance that required Jehovah's Witnesses to pay licensing fees in order to distribute religious materials door-to-door, explaining that the regulation was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 106, 113-14, 63 S.Ct. 870. The Court employed the same reasoning in *Cox v. New Hampshire*, upholding license fees of up to $300 to take part in a parade or procession because the fee was held "to be not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." 312 U.S. 569, 570-71, 576-77, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Accordingly, we recently approved the Utah Charitable Solicitations Act--which requires charitable fundraisers to register with the state and pay $250 for a permit--because that fee offsets increased regulatory costs associated with the act. *American Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1246, 1248-49 (10th Cir.2000). We held that "a regulatory fee may be constitutional only if it serves a 'legitimate state interest'" and that defraying the costs of a regulation aimed at protecting citizens from fraud is legitimate. *Id.* at 1248-49. Such fees may be imposed to defray both administrative expenses (such as processing and licensing costs) and the cost of enforcing the regulations. *National Awareness Found. v. Abrams*, 50 F.3d 1159, 1166 (2d Cir.1995) ("[E]nforcement power is necessary to ensure that the purposes of [the regulations] are served.").

The Do-Not-Call Implementation Act authorized the FTC to collect fees for fiscal years 2003 to 2007, requiring that "[s]uch amounts shall be available for expenditure only to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement." Pub. L. No. 108-10, 117 Stat. 557 at § 2

(2003). In enacting the fees regulation, the FTC stated it was authorized only "to assess fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR." Telemarketing Sales Rule Fees, 68 Fed.Reg. 45134, 45141 (July 31, 2003). The FTC estimated the costs of implementing and enforcing the national do-not-call registry at $18.1 million for fiscal year 2003. *Id.*

The record conclusively demonstrates that the do-not-call registry fees are to be used only to pay for expenses incident to the administration of the do-not-call registry, as required by *Murdock* and *Giani.* The FTC explained that the costs of the do-not-call registry fall into three major categories. First are the actual costs of developing and operating the national registry, such as the costs of handling consumer registration and complaints, transferring information from state lists to the registry, ensuring telemarketer access to the registry, and managing law enforcement access to appropriate information. *Id.* Second are the costs of enforcement efforts, such as domestic and international law enforcement initiatives to identify and challenge alleged violators, and consumer and business education efforts. *Id.* Third are the increased costs of agency infrastructure and administration, includ ing changes in information technology structural support necessary to handle anticipated increases in consumer complaints and requests from law enforcement agencies for access to such complaints. *Id.* The FTC decided upon the $25 per area code fee in order to ensure that it would collect the amount necessary to defray these costs.[15]

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[15] First, the FTC estimated that about 10,000 telemarketing firms would seek access to the list, and that the average telemarketer would pay to obtain about 73 area codes of data. 68 Fed.Reg. at 45141. Under those estimates, the expenses incident to the list would amount to about $25 per area code provided, excluding those that would be provided free of charge. Recognizing that its fee schedule is based on estimated figures, the FTC also emphasized that these fees would need to be reexamined

Therefore, we hold that the registry fees are a permissible regulatory measure designed to offset projected expenses incident to the administration and enforcement of the national do-not-call list, not an unconstitutional revenue tax.

B. The Established Business Relationship Exception

The telemarketers next argue that the FCC's established business relationship exception is arbitrary and capricious in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706. In particular, they contend that the FCC failed to give appropriate consideration to the anti-competitive effect that this exception may have on telecommunications markets. We conclude that the FCC did in fact address this concern, and that the FCC's exception for established business relationships is not arbitrary and capricious under the APA.

The arbitrary and capricious standard of review is a narrow one, and we are not empowered to substitute our own judgment for that of the administrative agency. *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir.1996). "Generally, an agency decision will be considered arbitrary and capricious if 'the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir.1997) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

The Telecommunications Act of 1996, 47 U.S.C. § 251 et seq., required local telephone monopolies to make their

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periodically and adjusted to reflect the FTC's actual experience in operating the registry. *Id.* at 45141-42.

facilities and services available to competitors for negotiated or arbitrated prices, and directed the FCC to establish regulations to advance local competition. The FCC enacted its do-not-call rules under different statutory authority, the TCPA, which specifically authorized the FCC to establish a national database of residential telephone subscribers who object to receiving telephone solicitations. *See* 47 U.S.C. § 227(c)(3).

When an agency is charged to enforce overlapping and at times inconsistent policies, it cannot act single-mindedly in furtherance of one of those policies while wholly ignoring the other. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46-47, 62 S.Ct. 886, 86 L.Ed. 1246 (1942); *McLean Trucking Co. v. United States*, 321 U.S. 67, 80, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

The FCC rule sufficiently addresses the telemarketers' concerns about the established business relationship exception. In its notice of rulemaking, the FCC asked for comments on the anti-competitive effect this exception might have on the telecommunications industry. *See* 68 Fed.Reg. at 44159. The FCC received responses indicating that such an exception would favor incumbent telephone service providers who would be able to market new services to their larger customer base. *Id.* at 44159-60. Also, the FCC noted some respondents' concerns that this anti-competitive effect would be particularly strong because telephone solicitations are currently the primary mechanism for selling telecommunications services. *Id.* at 44159. The FCC then considered several proposed ways in which such an anti-competitive effect could be mitigated, rejecting each of them.

First, the FCC considered a proposal to narrow the established business relationship exemption so that no telecommunications company could call its customers to advertise different services. *Id.* at 44160. However, the FCC cited comments in its administrative record emphasizing the

importance of "flexibility in communicating with . . . customers not only about their current services, but also to discuss available alternative services or products." *Id.* Accordingly, the FCC concluded that limiting telecommunications companies' ability to market new goods or services to existing customers would not be in the public interest. *Id.*

Second, the FCC considered a proposal that the Commission revise the definition of established business relationship so that all providers of telecommunications services would be deemed to have such a relationship with all consumers, even if they had not in fact had any preexisting business connections. *Id.* Third, it considered an alternative proposal that the definition of established business relationship be revised to exclude companies who have historically been dominant or monopoly service providers, at least until such time as the new entrants to the telecommunications industry sufficiently penetrated the market. *Id.* The FCC concluded that these proposals would not adequately fulfill Congress' mandate to protect residential telephone subscribers' privacy rights to avoid telemarketing calls to which they object: "To permit common carriers to call consumers with whom they have no existing relationships and who have expressed a desire not to be called by registering with the national do-not-call list, would likely confuse consumers and interfere with their ability to manage and monitor the telemarketing calls they receive." *Id.*

The FCC then explained the factors it believed would limit the established business relationship exception's anti-competitive effect. First, it noted that all providers of telecommunications services--incumbent carriers and new competitors alike--may contact competitors' customers who have not signed up for the national do-not-call registry. *Id.* Second, consumers who have signed up for the do-not-call registry still have the ability to place their carrier on a

company-specific do-not-call list, thereby overriding the established business relationship exception. *Id.* Finally, the FCC emphasized that telecommunications providers are still free to use other means of marketing their products to consumers, such as direct mailings. *Id.*

The FCC's rule demonstrates that the agency did not simply ignore the potential anti-competitive effect of the established business relationship exception or its duties under the Telecommunications Act. Rather, the FCC analyzed the possible effects that this exception may have on the telecommunications industry and explained why it believed its rule would minimize any adverse consequences. When an agency has made a reasoned policy decision, "we are not empowered to substitute our judgment for that of the [agency]" under the arbitrary and capricious standard of review. *Browner*, 97 F.3d at 424. The FCC did not act in an arbitrary and capricious manner in adopting the established business relationship exception, and we decline the telemarketers' invitation to displace the FCC's policy judgment.

C. The FTC's Statutory Authority

In case No. 03-6258, the district court held that the FTC lacked statutory authority to enact the do-not-call registry. In the Telemarketing Act, Congress authorized the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." Pub.L. 103-297, 108 Stat. 1545 at § 3. More specifically, Congress directed the FTC to include "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." *Id.* The FTC's conclusion that this language authorized it to enact the national do-not-call registry is entitled to deference under the familiar test outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694

(1984).[16] In light of this deference, we conclude that the FTC did have statutory authority to promulgate its do-not-call regulations because the agency's view that the Telemarketing Act authorized it to enact those rules is at least a permissible construction of that statute.

Moreover, even if some doubt once existed, Congress erased it through subsequent legislation. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."); *Schism v. United States*, 316 F.3d 1259, 1289 (Fed.Cir.2002) ("Congress may ratify agency conduct 'giving the force of law to official action unauthorized when taken.'") (citing *Swayne & Hoyt v. United States*, 300 U.S. 297, 302, 57 S.Ct. 478, 81 L.Ed. 659 (1937)). In the Do-Not-Call Implementation Act, Congress directed the FCC and FTC to maximize consistency between their respective do-not-call rules and authorized the FTC to collect do-not-call registry fees to offset the administrative costs of the regulations. Pub.L. 108-10, 117 Stat. 557 at §§ 2-3. Furthermore, in response to the district court's decision in case No. 03-6258, Congress expressly ratified the FTC's do-not-call regulations. An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub.L. 108-82, 117 Stat 1006 (2003). The FTC's statutory authority is now unmistakably clear.

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[16] In reviewing an agency's construction of a statute it administers, we first ask whether Congress has directly spoken to the precise question at issue. If so, that is the end of the matter and Congress' intent controls. If the statute is silent or ambiguous with respect to this issue, our inquiry is limited to whether the agency's interpretation is a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778.

V. CONCLUSION

We hold that 1) the do-not-call list is a valid commercial speech regulation under *Central Hudson* because it directly advances substantial governmental interests and is narrowly tailored; 2) the registry fees telemarketers must pay to access the list are a permissible measure designed to defray the cost of legitimate government regulation; 3) it was not arbitrary and capricious for the FCC to adopt the established business relationship exception; and 4) the FTC has statutory authority to establish and implement the national do-not-call registry.

The judgments below in cases 03-1429 and 03-6258 are REVERSED with respect to the questions presented in this appeal, and the petitions for review in cases 03-9571 and 03-9594 are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

[Filed Oct. 7, 2003]

No. 03-1429

FEDERAL TRADE COMMISSION; TIMOTHY J. MURIS, Chairman of the FEDERAL TRADE COMMISSION, in his official capacity; SHEILA F. ANTHONY, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; MOZELLE W. THOMPSON, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; ORSON SWINDLE, Commissioner, Federal Trade Commission, in his official capacity; THOMAS B. LEARY, Commissioner, Federal Trade Commission, in his official capacity; and J. HOWARD BEALES III, Director, Bureau of Consumer Protection, in his official capacity,

Petitioners,

v.

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG MARKETING, INC., a Colorado corporation; AMERICAN TELESERVICES ASSOCIATION,

Respondents.

ORDER

Before SEYMOUR, EBEL, and HENRY, *Circuit Judges*.

PER CURIAM.

The Federal Trade Commission (Petitioner) ("FTC") challenges an order of the United States District Court for the

District of Colorado permanently enjoining the FTC from implementing provisions in its amended Telemarketing Sales Rule creating a national do–not–call list. The Rule created a federal registry of telephone numbers of consumers who have indicated that they do not wish to receive unsolicited telephone calls from commercial telemarketers, and it prohibits those telemarketers from making sales calls to consumers on the list.[1] The Federal Communications Commission (FCC), in coordination with the FTC, has also ordered the establishment of a national do–not–call list. The only issue to be decided at this time is the FTC's request for a stay of the district court's order pending this Court's decision on the merits.

I. Standard for Granting Stay

The FTC's request for a stay is governed by Federal Rules of Appellate Procedure 8 and 18. To obtain a stay under these rules, the FTC must address the following factors: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir.2001); 10th Cir. R. 8.1.

As an initial matter, the district court suggested that an additional inquiry overlays this Court's analysis of whether to grant a stay of the district court's order pending appeal. Specifically, it cited decisions from this Court setting out the following types of preliminary injunctions as "disfavored": (1) one that disturbs the status quo; (2) one that affords the

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[1] Commercial telemarketers are exempt from the FTC's do–not–call prohibitions if they have received express written consent from the consumers they call, or if they call consumers with whom they have an established business relationship. Telemarketing Sales Rule, 68 Fed.Reg. 4580, 4629 (Jan. 29, 2003).

movant substantially all the relief the movant may recover at the conclusion of a full trial on the merits; and (3) one that is mandatory as opposed to prohibitory. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 n. 4 (10th Cir.2001); *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir.1991). The concerns arising from the first two types of "disfavored" injunctions are relevant only in a merits review of a preliminary injunction issued by a district court, typically on an incomplete record. Those concerns do not, however, constrain our decision whether to stay a lower court's permanent injunction issued after consideration of a complete record.[2] The concern about mandatory injunctions is not a factor in this case because a decision to stay the district court's permanent injunction does not constitute a judicial mandate requiring any of the litigants to take any action. Such a stay order would suspend an injunction, not impose one. Therefore, we do not apply the heightened scrutiny required for "disfavored" preliminary injunctions.

With respect to the four stay factors,[3] where the moving party has established that the three "harm" factors tip decid-

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[2] When issuing a preliminary injunction, a district court typically bases its decision on an incomplete record. *See, e.g., N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 753 (10th Cir.1987). As such, there is a heightened risk of issuing a preliminary injunction that will ultimately prove to be inconsistent with the court's final adjudication on the merits, resulting in irreparable injury to a party. Where, as here, there has been a full adjudication on the merits by the district court and we are considering whether to stay the district court's *permanent* injunction pending appeal, we have the benefit of a full, developed record on which to base our decision. Thus, the concerns that would trigger heightened review in the context of a preliminary injunction proceeding do not arise in the context of an appeal of a permanent injunction taken after a final judgment on the merits.

[3] In our evaluation of these four stay factors, we have considered, inter alia, the enabling statutes, legislative history, FTC and FCC regulations and agency records, the district court's decision on the merits and its order denying a stay pending appeal, the parties' motions and responses filed in this Court, and various amicus submissions.

edly in its favor, the "probability of success" requirement is somewhat relaxed. *Prairie Band*, 253 F.3d at 1246; *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781–82 (10th Cir.1964). Under those circumstances, probability of success is demonstrated when the petitioner seeking the stay has raised "questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Prairie Band*, 253 F.3d at 1246–47 (internal quotations omitted).

We conclude that, on balance, the three "harm" factors alone do not support a relaxed review of the probability of success factor. With respect to the second and fourth factors–which are necessarily conflated because the FTC's asserted injury is exclusively one involving the public interest–we conclude that the public does have strong privacy and expectation interests that weigh in favor of granting this stay pending review of the merits. Yet the third factor–injury to opposing parties if the stay is granted–weighs against granting the stay because Respondents will likely suffer harm if the FTC's do–not–call regulation comes into effect and is later determined to be unconstitutional, even though their injury would be tempered by our granting expedited review of this case on the merits.[4] Although we conclude that on balance the harm factors tip in the FTC's favor, those factors do not weigh so heavily towards the FTC as to justify a relaxed review of the final factor, likelihood of success on the merits. Therefore, we will grant a stay only if the FTC shows a substantial likelihood of success on the merits of its appeal. We turn then to that analysis.

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[4] Although the amended Telemarketing Sales Rule apparently would place perhaps fifty million phones off limits, that still leaves a very large population of phones that would be called during the time that this Court considers the appeal on its merits, and such phones are likely to represent more responsive potential buyers of goods and services that are marketed by telemarketing calls.

II. Likelihood of Success on the Merits

The Supreme Court has identified a 3–step test to analyze First Amendment challenges to restrictions applied to lawful and non–misleading commercial speech. Regulation of such commercial speech passes constitutional muster if (1) the government asserts a substantial interest to be achieved by the restrictions; (2) the restriction directly advances that governmental interest; and (3) the restriction is narrowly tailored to meet that interest. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Together, the final two factors in the *Central Hudson* analysis require that there be a "fit between the legislature's ends and the means chosen to accomplish those ends." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–28, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). The government bears the burden of demonstrating both a substantial interest and the fit between that interest and the challenged restriction. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir.2001). The *Central Hudson* test does not require that the regulation be the least restrictive means of achieving the interest asserted, but only that it be narrowly tailored to meet the desired objective. *Board of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

For purposes of First Amendment analysis, to show a reasonable fit the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486–87, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). However, in response to a First Amendment challenge to a regulation, the government is not limited in the evidence it may use to support the asserted harms; it may demonstrate its justification with anecdotes, history, consensus, and simple common sense. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628, 115 S.Ct. 2371, 132 L.Ed.2d 541

(1995). Moreover, while the fit must be reasonable and in proportion to the interest served, it need not be a perfect fit or the be[illegible]nt. *Fox*, 492 U.S. at 480, 109 S.Ct. 3028. "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." *Edge Broad. Co.*, 509 U.S. at 434, 113 S.Ct. 2696. We do not require "that the Government make progress on every front before it can make progress on any front." *Id.*

A. *Substantial Governmental Interest*

The FTC's do–not–call list includes commercial telemarketers but specifically excludes calls from charitable organizations. The FTC has asserted that this distinction between commercial and non–commercial speech is justified by (1) a greater risk of abusive practices associated with commercial calls, and (2) commercial solicitation's greater impact on consumer privacy, based both on the greater number of commercial calls and upon the less welcome nature of commercial calls.[5] The district court found, and

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[5] The district court believed that the FTC admitted in its regulation that privacy interests cannot justify a distinction between commercial and charitable telemarketing calls. (Mem. Opinion & Order at 7.) We disagree.

Before the FTC amended its Telemarketing Sales Rule, certain charitable organizations asked the agency not to include non–commercial callers in any do–not–call list (neither a national do–not–call list nor a company–specific do-not-call list). Although the FTC decided not to include charitable callers in a national do–not–call list, it was unwilling to exclude them from its company–specific do-not-call list if particular homeowners wanted to designate them specifically. In this context, the FTC stated that charitable callers, in addition to commercial callers, had an effect on homeowners' privacy, and thus should not be completely immune from a consumer–initiated restriction. The FTC stated that "the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers" and it therefore concluded that some regulation was appropriate even in the non–commercial context. 68 Fed. Reg. 4637. However, the FTC never found that commercial and non–commercial callers affected homeowners' privacy interests to the *same* degree. Rather, it emphasized "fundamental

Mainstream Marketing Services does not dispute, that these asserted interests in preventing abusive practices and protecting residential privacy are substantial under the first prong of *Central Hudson*.

The Supreme Court has held that there is undoubtedly a substantial governmental interest in the prevention of abusive and coercive sales practices. *See Edenfield v. Fane*, 507 U.S. 761, 768-69, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The prevention of intrusions upon privacy in the home is another paradigmatic substantial governmental interest. In *Rowan v. United States Post Office Department*, the Supreme Court held that protecting individual privacy is an important governmental interest, especially in the context of the home. 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). The Court recognized "the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property." *Id.* at 737, 90 S.Ct. 1484. "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." *Id. See also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 164–65, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (noting that "residents' privacy" is among "important interests that the Village may seek to safeguard through some form of regulation of solicitation activity"); *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("The State's interest in protecting the well–being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.") (quotation omitted). In the context of telephone solicitations,

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differences" between commercial and charitable solicitation that make commercial callers more likely to "engage in all the things that telemarketers are hated for." *Id.* Because of this distinction, the FTC found it appropriate to subject commercial telemarketers to the national do–not–call registry, but to regulate charitable callers only under the less burdensome company–specific do–not–call rules. *Id.*

this privacy interest is not limited to the ringing of the phone; rather, how invasive a phone call may be is also influenced by the manner and substance of the call.

Therefore, the FTC's justifications of preventing abusive and coercive sales practices and protecting privacy are substantial governmental interests. We turn now to analyzing whether the FTC has established a likelihood of success on its contention that the do–not–call list bears a reasonable fit with these interests.

B. *Reasonable Fit*

1. *Relevant Factors in Analyzing Reasonable Fit*

Although a regulation may draw a line between commercial and non-commercial speech, that distinction must bear a relationship to the legitimate interests the government seeks to achieve. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424, 428, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). For example, a distinction between commercial and non–commercial speech could be justified by reference to the differing impact those categories of speech have on esthetics, safety, privacy, or the like. In contrast, the distinction may not be justified on a perceived "low value" of commercial speech. *Id.* at 428, 113 S.Ct. 1505.

In *Discovery Network*, the Supreme Court struck down a city ordinance banning freestanding commercial newsracks on grounds that the restriction was not narrowly tailored. 507 U.S. at 412, 430, 113 S.Ct. 1505. The Court recognized that the city had substantial interests in esthetics and safety that were impaired by freestanding newsracks, but concluded that there was no reasonable fit between those goals and the city's policy of banning only commercial newsracks while leaving similar non–commercial newsracks undisturbed. *Id.* at 418, 113 S.Ct. 1505. Although the Court recognized that there may be situations where "differential treatment of commercial and noncommercial newsracks" could be justified by a reasonable

fit with the government's interest in esthetics and safety, it held that the government had failed to make any such showing in that case. *Id. See also Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655–56 (8th Cir.2003) (holding that unsolicited commercial fax prohibition in Telephone Consumer Protection Act was a reasonable fit with substantial governmental interest of reducing costs and intrusion, because commercial faxes are more intrusive than non–commercial faxes).

Whether a commercial solicitation restriction meets the "reasonable fit" test depends in part on the existence of private choice on the part of homeowners. In *Martin v. City of Struthers*, the Supreme Court struck down a city ordinance banning door–to–door canvassing because it took the right to decide whether to receive visitors away from the individual's own private choice. 319 U.S. 141, 148–49, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). While recognizing the government's interest in protecting privacy, the Court held that the ordinance swept too broadly because the dangers of door–to–door canvassing easily could have been controlled by giving the householder the right to decide whether to receive visitors. *Id.* at 144, 147–48, 63 S.Ct. 862. *See also Watchtower Bible*, 536 U.S. at 168–69, 122 S.Ct. 2080 (stating that provision facilitating residents' own utilization of "no solicitation" signs was less restrictive than permit requirement and sufficient to further state's privacy interest); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (stating that targeted consumer–initiated blocking is "less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compel ling interests").

Rowan demonstrates that the element of private choice in an opt–in feature is relevant for purposes of analyzing "reasonable fit." In *Rowan*, the Court upheld an opt–in do–

not–mail list system in which a homeowner could require that a commercial advertiser remove his or her name from its mailing list if the homeowner determined in his or her "sole discretion" that the material received was erotically arousing or provocative. *Rowan*, 397 U.S. at 730, 90 S.Ct. 1484. In finding the privacy regulation reasonable, the Court emphasized the element of private choice, stating that the homeowner was the "exclusive and final judge of what will cross his threshold." *Id.* at 736, 90 S.Ct. 1484.

Other courts have relied on *Rowan*'s analysis in finding that similar mechanisms of private choice in solicitation restrictions weigh in favor of finding a "reasonable fit." *See, e.g., Anderson v. Treadwell*, 294 F.3d 453, 462–63 (2d Cir.2002) (noting, in its "reasonable fit" analysis, that resident–activated solicitation restriction was narrowly tailored and of the kind "endorsed by the Supreme Court in *Rowan*"); *Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir.1998) (invalidating solicitation restriction as lacking "reasonable fit" because, unlike *Rowan*, "[h]ere, the state, not the homeowner, has made the distinction between real estate solicitations and other solicitations without a logical privacy–based reason").

In sum, a regulation drawing a line between commercial and non–commercial speech must have a reasonable fit with substantial governmental interests. The "reasonable fit" analysis will at least partially depend upon whether the initiation of the solicitation restriction is at the hands of private citizens or the government. Additionally, we will consider the extent to which the regulatory scheme will materially advance the governmental interest, *see Discovery Network*, 507 U.S. at 418, 113 S.Ct. 1505, and the disparity in treatment between commercial and non–commercial speech.

2. *The FTC's Record Evidence Supporting a Reasonable Fit Between the National Do–Not–Call List and its Asserted Justifications*

In light of the above legal standards, we must review the record to determine the FTC's asserted rationales for applying its national do–not–call restrictions only to commercial sales calls, and the evidence to support those rationales. Here, the FTC attempts to justify this distinction by showing that commercial telemarketing is more abusive and coercive than charitable telemarketing and constitutes a greater intrusion upon consumer privacy. We are mindful that these rationales overlap to some extent.

In reviewing the FTC's rationales for its amended rules and the evidence in support of those rationales, it is important to keep in mind that the myriad of statutes, legislative history, and administrative rules addressing federal telemarketing regulation are largely interconnected and involve both the FCC and the FTC. Instead of repeating factual findings and policy rationales in each separate enactment, the FTC and FCC have often incorporated those findings by cross–reference. For instance, in creating a company–specific do–not–call list applicable only to commercial telemarketers in the original Telemarketing Sales Rule (which the FTC enacted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, or "TCFPA"), the FTC "considered, among other things, the approach taken by Congress and the FCC in the TCPA and its implementing regulations."[6] Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4591 (Jan. 29, 2003). *See also* FCC Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44144, 44145 (July 25, 2003) ("[W]e agree with the vast majority of consumers in this proceeding and the FTC that a national do–not–call registry is necessary to

[6] The TCPA is the Telephone Consumer Protection Act of 1991.

enhance the privacy interests of those consumers that do not wish to receive telephone solicitations."); Do–Not–Call Implementation Act, Pub. L. 108–10 at § 3 (Mar. 11, 2003) ("In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission."). Therefore, we must examine each of these interrelated telemarketing enactments in evaluating the asserted justifications for the FTC's distinction between commercial speech and non–commercial speech. We briefly discuss here the most relevant of these acts and regulations.

a. *Telephone Consumer Protection Act (TCPA)*

In the TCPA, Congress found that unrestricted telemarketing can be an intrusive invasion of privacy and that many consumers are outraged by the proliferation of intrusive calls to their homes from telemarketers. Pub.L. 102–243 at § 2 (Dec. 20, 1991). Therefore, Congress in the TCPA authorized the FCC to establish a national database of residential subscribers who object to receiving "telephone solicitations." *Id.* at § 3. A "telephone solicitation" was defined as a "telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services," excluding, inter alia, calls from a tax exempt nonprofit organization. *Id.* This definition excluded charitable telemarketers.

According to the legislative history accompanying the TCPA, "the record suggests that most unwanted telephone solicitations are commercial in nature. Complaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R.Rep. No. 102–317, at 16 (1991). The House Report cited statistical data from several states reporting that consumer complaints were directed mostly at commercial sales calls. *Id.* Moreover, the Committee found

that non–commercial calls were less intrusive to consumers because they are more expected and because there is a lower volume of non–commercial calls. *Id.* It concluded that "the two main sources of consumer problems–high volume of solicitations and unexpected solicitations–are not present in solicitations by nonprofit organizations . . . . It is on this basis that the Committee believes that the scope of the regulation is a workable 'commercial speech' distinction consistent with Supreme Court precedent." *Id.* at 16–17. This distinction between commercial and non–commercial telemarketing, justified in the TCPA, persists in all subsequent legislation and administrative rules regulating telemarketing calls.

b. *Telemarketing and Consumer Fraud and Abuse Prevention Act* (TCFPA)

In the TCFPA, Congress directed the FTC to prescribe rules prohibiting deceptive and abusive telemarketing acts and practices, including calls that a reasonable consumer would consider coercive or abusive of such consumer's right to privacy. Pub. L. 103–297 at § 3 (Aug. 16, 1994). Congress found that consumers lose an estimated $40 billion each year in "telemarketing" fraud and are victimized by other forms of "telemarketing" deception and abuse. *Id.* at § 2. Significantly, Congress in the TCFPA defined the term "telemarketing" as calls "conducted to induce purchases of goods or services,"–e.g., commercial calls. *Id.* at § 7. This is the Act under which the FTC enacted the national do–not–call regulations challenged in this case.

c. *1995 Telemarketing Sales Rule*

In 1995, acting pursuant to the TCFPA, the FTC established a company–specific do–not–call provision, which prohibited telemarketers from making sales calls to persons who had previously stated their desire not to receive such calls from that solicitor. Telemarketing Sales Rule, 60 Fed. Reg. 43842, 43854–55. This rule did not apply to an entity

such as a charitable organization that was not "organized to carry on business for its own profit or that of its members." *Id.* at 43843 n. 14. Accordingly, the distinction between commercial and non-commercial speech, first enacted in the TCPA, was present in the initial FTC Telemarketing Sales Rule. In justifying this rule, the FTC relied in part on the TCFPA and its legislative history, which emphasized that sellers of goods and services regularly subjected consumers to deception and abuse infringing upon their privacy rights. *Id.* at 43842. Moreover, the FTC later explained that when enacting this original Telemarketing Sales Rule it also considered the TCPA (which as noted above explicitly drew a distinction between commercial and non–commercial solicitations in its legislative history) and related FCC action. 68 Fed. Reg. at 4591.

d. *2003 Amended Telemarketing Sales Rule*

In its amended Rule (the subject of the instant litigation), the FTC established a national do–not–call registry that allowed individuals to block all commercial sales calls, with certain exceptions. 68 Fed. Reg. 4580, 4629. Most significantly to this case, the FTC preserved the distinction between commercial and non–commercial calls by limiting "coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods or services, thus exempting telemarketing calls on behalf of charitable organizations." *Id.* The "sellers of goods or services" limit relates back to Congress' findings in the TCFPA, which had documented a history of abuses specifically committed by telemarketers selling goods or services.

Importantly, the amended FTC Telemarketing Sales Rule did subject charitable organizations to the company–specific do–not–call provision. *Id.* In this amended Rule, the FTC retained the basic distinction between commercial and non–commercial calls already present in the earlier version of the

Telemarketing Sales Rule, although the amended rule resulted in stricter requirements for both categories of calls.

The FTC found that the original Rule's company–specific do–not–call list was inadequate to prevent the type of abusive commercial sales calls it was intended to prohibit. *Id.* at 4629, 4631. The FTC concluded that "[T]he registry is . . . designed to cure the inadequacies as a privacy protection measure that became apparent in the company–specific 'do–not–call' provisions included in the original Rule." *Id.* at 4635. For example, the FTC referred to complaints that commercial telemarketers ignored consumers' repeated requests to be placed on company–specific do–not–call lists. *Id.* at 4629.[7] It concluded that the national do–not–call list will also prevent fraud or abuse in some cases by protecting vulnerable consumers from exploitative telemarketers. *Id.* at 4635, n. 669.

Furthermore, the FTC specifically found that "fundamental differences between commercial solicitations and charitable solicitations may confer upon the company–specific 'do–not–call' requirements a greater measure of success with respect to preventing a pattern of abusive calls from a fundraiser to a consumer than it was able to produce in the context of commercial fundraising." *Id.* at 4637. Specifically, it reasoned that in an advocacy call, such as a charitable solicitation, a significant purpose of the call is to "sell" a

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[7] It is true that the FTC did not have comparable experience regarding whether a company–specific do–not–call list would be ineffective as to charitable callers because up to that point in time charitable callers had not been subjected to a company–specific do–not–call list. However, the fact that the FTC did not yet have a record as to the need to include charitable callers on a national do–not–call list does not mean that it could not at least address the problem as to which it did have an adequate record–that the more limited company–specific do–not–call list was ineffective to prevent invasions of privacy and abusive practices among *commercial* solicitors. *United States v. Edge Broad. Co.*, 509 U.S. at 434, 113 S.Ct. 2696 (noting the government is not required "to make progress on every front before it can make progress on any front").

cause, not simply to receive a donation. Therefore, the FTC found that it would be self–defeating for a non–commercial caller to engage in abusive telemarketing practices that invade personal privacy because such conduct could alienate the recipient against the cause the caller was attempting to promote. *Id.* "When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non–commercial speech is a different matter." *Id.* In enacting these provisions, the FTC cited both the TCFPA and the TCPA, noting that "Congress knowingly put the FTC on the same path that the FCC had trod." *Id.* at 4638.

e. *2003 FCC Rules and Regulations*

Finally, in July 2003, the FCC enacted regulations to "establish, with the Federal Trade Commission (FTC) a national do–not–call registry." 68 Fed. Reg. at 44144. Similar to the FTC's do–not–call regulations, the FCC list was not designed to apply to charitable callers. Citing the legislative history to the TCPA (which, as noted before, contained a congressional justification for distinguishing between commercial and non–commercial calls), the FCC reaffirmed that most unwanted telephone solicitations are commercial in nature and that charitable calls are less intrusive to consumers. *Id.* at 44153. The FCC rule also provided for a company-specific do–not–call system for consumers who elect not to register for the national list. *Id.* at 44155.

f. *Summary*

Congress expressly made factual findings in the TCFPA that telemarketing calls "conducted to induce purchases of goods or services" have subjected consumers to substantial fraud, deception, and abuse. Pub. L. 103– 297 at §§ 2, 7. Consequently, in enacting a national do–not–call registry, the FTC "decided to limit coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods

or services." 68 Fed.Reg. 4629. Furthermore, the FTC's revised Telemarketing Sales Rule states that the agency relied on TCPA and FCC authority when it initially endorsed the distinction between commercial and non–commercial calls. *Id.* at 4591. The legislative history accompanying the TCPA, citing complaint statistics, found that commercial telemarketing intrudes upon personal privacy more than non–commercial telemarketing.

3. *The FTC's Likelihood of Success*

In light of this record, it appears that the FTC is likely to succeed on its argument that the distinction in the Amended Telemarketing Sales Rule between commercial and non–commercial phone solicitation passes muster under *Central Hudson*'s reasonable fit analysis. The line between these two types of speech is not drawn solely on the basis of the lesser degree of scrutiny applied to commercial speech. *See Discovery Network*, 507 U.S. at 428, 113 S.Ct. 1505. Rather, we examine the constitutionality of the distinction under the *Central Hudson* test with reference to the substantial governmental interest in preventing the greater risk of privacy invasion and abusive sales practices correlated with commercial telemarketing.

We find it relevant that the national do–not–call list is of an opt–in nature, which provides an element of private choice and thus weighs in favor of a reasonable fit. The list is not invoked until the homeowner makes a private decision to invoke it. *See Rowan*, 397 U.S. at 737, 90 S.Ct. 1484; *Playboy Entm't Group*, 529 U.S. at 815, 120 S.Ct. 1878. We also find it relevant that the FTC has not exempted non–commercial speech totally from all regulation, as consumers are also given some mechanism to block non–commercial solicitations by means of company–specific objections to solicitations by charitable organizations. And it is permissible for the FTC to act now to fix a problem upon which it has record support (the inadequacy of company–specific do–not–

call lists to prevent invasion of privacy and abusive practices in the context of commercial calls) without waiting until it can develop experience on whether or not a company–specific do–not–call list will be effective to prevent such abuses in the context of non–commercial telemarketing. *Edge Broad. Co.*, 509 U.S. at 434, 113 S.Ct. 2696. Finally, this is not a regulatory scheme that will only affect a "minute" portion of the problematic speech because the great majority of all telemarketing calls–and therefore the preponderant source of the problem of invasion of privacy and abusive calls–are commercial calls which are covered by the FTC's rule. *See Discovery Network*, 507 U.S. at 418, 113 S.Ct. 1505.

In the context of analyzing whether to stay the district court's injunction, we conclude there is a substantial likelihood that the FTC will be able to show a reasonable fit between the substantial governmental interests it asserted and the national do–not–call list or, in other words, that the list directly advances the government's substantial interests and is narrowly tailored. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343.

III. Conclusion

In light of our conclusions as to the three harm factors addressed above, we will stay the district court's order only if the FTC shows substantial likelihood of success on the merits. After reviewing the record and the parties' submissions, we are satisfied the FTC has met its burden.

We ORDER the district court's permanent injunction preventing implementation of the FTC's national do–not–call list stayed pending final resolution of this appeal on the merits. We further ORDER that the petition for review on the merits be expedited. The FTC shall file its opening brief on October 17. Mainstream Marketing shall file its responsive

brief on October 31. The FTC shall file any reply on November 7. Oral argument will be held in Tulsa, Oklahoma, on November 10, 2003.[8]

[8] We also GRANT the states' September 30 motion for leave to file a brief as amici and the additional states' October 1 motion to join the amici brief.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-9571

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG MARKETING, INC., a Colorado corporation; AMERICAN TELESERVICES ASSOCIATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

ORDER
Filed September 26, 2003

Before SEYMOUR, EBEL and HENRY, *Circuit Judges*.

PER CURIAM.

Petitioners seek review of an order of the Federal Communications Commission (FCC) adopting rules and regulations implementing the Telephone Consumer Protection Act of 1991 (TCPA). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144 (2003). Jurisdiction over this petition for review is vested in the federal court of appeals. 28 U.S.C. § 2342(1) (1994). Venue is appropriate in either the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. *Id.* § 2343. Petitioners have

their principal office in Denver, Colorado, and venue is therefore appropriate in this court.

The only issue to be decided at this time is petitioners' request for a stay of certain provisions of the FCC's order pending review of the order on the merits. The order is scheduled to go into effect on October 1, 2003. Petitioners' request for stay is governed by Federal Rules of Appellate Procedure 8 and 18. To obtain a stay under these rules, petitioners must address the following four factors: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay is not granted; (c) the absence of harm to opposing parties; and (d) the risk of harm to the public interest. *See, e.g., Spain v. Podrebarac*, 68 F.3d 1246, 1247 (10th Cir. 1995); 10th Cir. R. 8.1.

Where the moving party has established the three "harm" factors, the "probability of success" requirement is relaxed somewhat. *See Lundgrin v.* Claytor, 619 F.2d 61, 63 (10th Cir. 1980). Under those circumstances, probability of success is demonstrated when the petitioner seeking the stay has raised "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (14th Or. 1996) (quotation omitted).

We conclude, first, that petitioners have established they will suffer irreparable injury if a stay is not granted. The remaining two harm factors are conflated in this instance because the FCC is a governmental agency charged with protecting the public interest. We conclude that petitioners have failed to meet their burden on these remaining two factors, for two reasons. First, the public interest in respecting "residential privacy" weighs against a stay of the FCC's order. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). Second, the strong expectation interest of the many

millions of Americans who have registered with the FCC's "do not call" list weighs in favor of denying the stay.

Since petitioners have failed to establish that each of the harm factors tilts in their favor, they are required to show a substantial likelihood of success on the merits of their petition. On the record presented, we conclude that petitioners have failed to establish a substantial likelihood of success on the merits, and we therefore DENY the motion for stay of the FCC's order pending review of the merits.

The panel further orders that the petition for review on the merits be expedited, and that oral argument be scheduled on the petition at the earliest practical time. The clerk of this court is directed to establish a briefing and oral argument schedule consistent with this order to expedite the petition for review.

Entered for the Court
PATRICK FISHER, Clerk of Court

APPENDIX D

UNITED STATES DISTRICT COURT,
D. COLORADO

[Filed Sept. 29, 2003]

No. CIV.A.03–N–184 (MJW)

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG MARKETING, INC., a Colorado corporation; and AMERICAN TELESERVICES ASSOCIATION,
Plaintiffs,

v.

FEDERAL TRADE COMMISSION
Defendant.

ORDER DENYING STAY OF JUDGMENT

NOTTINGHAM, *District Judge*.

This matter is before the court on "Defendant Federal Trade Commission's Motion for an Emergency Stay Pending Appeal," filed September 26, 2003. The motion asks this court to stay its order and judgment enjoining the FTC from enforcing its amended Rules (issued in December 2002) establishing and implementing a national do–not–call registry applicable to commercial telemarketers on October 1, 2003. *See* Mem. Op. & Order (D.Colo. Sept. 25, 2003) (hereinafter abbreviated as "Order"). The FTC simultaneously filed a Notice of Appeal from the Order and judgment. Procedurally, therefore, the matter is controlled by rule 62(c) of the Federal Rules of Civil Procedure, which provides, in pertinent part, as follows:

> When an appeal is taken from [a] . . . final judgment granting . . . an injunction, the court in its discretion may

> suspend . . . [or] modify . . . an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Since an agency of the United States has taken this appeal, however, "no bond, obligation, or other security shall be required from the appellant." Fed.R.Civ.P. 62(e).

In order to obtain a stay of an injunction pursuant to rule 62(c), the FTC, as the applicant, must persuade the court on the following issues:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776–77, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020–1021 (10th Cir.1996) (citing standard for preliminary injunction as applicable in evaluating motion to stay pending appeal); *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1077 (8th Cir.1974). The court will momentarily address each issue, although not in the numerical order enumerated in *Hilton*.

As a preliminary matter, it is pertinent to note that the purpose of a stay is to preserve the status quo pending appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020–1021 (10th Cir.1996) (citing standard for preliminary injunction as applicable in evaluating motion to stay pending appeal). There are three types of stays that are generally disfavored: (1) those that afford the moving party substantially all the relief it might recover after appeal on the merits, (2) those that disturb the status quo, and (3) those that are mandatory as opposed to prohibitory. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 n. 4 (10th Cir.2001) (applying

standard to issuance of preliminary injunction). These types of disfavored stays should not be granted unless the four factors weigh heavily and compellingly in favor of the stay. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154–55 (10th Cir.2001) (applying standard to issuance of preliminary injunction).

Here, the proposed stay would (1) afford the FTC all of the relief it would recover after appeal, (2) disturb the status quo, and (3) mandate that telemarketers comply with the do–not–call registry. If the Order is stayed, the FTC do–not–call registry will go into effect on October 1, 2003, and require telemarketers to pay fees for access to the registry. Telemarketers will be prohibited from calling telephone numbers on the list, which may result in significant lay offs of employees in the industry. This result gives the FTC all the relief it seeks on appeal. Additionally, this result disturbs the status quo and is mandatory because it requires telemarketers to abide by new rules that add significant regulatory burdens to the practice of telemarketing. Accordingly, the court concludes that the FTC must show that the four factors weigh heavily in favor of a stay of the Order pending appeal.

1. WOULD A STAY OF THE INJUNCTION SUBSTANTIALLY INJURE OTHER PARTIES INTERESTED IN THE PROCEEDING?

If the injunction is stayed and the FTC implements the do–not–call registry, as scheduled, on October 1, 2003, plaintiffs and other similarly–situated commercial telemarketers will effectively be prohibited from calling any number appearing on the registry. Plaintiffs identify two categories of injury which this prohibition will entail. First, it indisputably curtails their first amendment freedom to engage in commercial speech. This circumstance, standing alone, constitutes substantial and irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347,

373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), *quoting New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir.1999); *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F.Supp. 1558, 1563 (M.D.Ala.1996).

The court must also consider a second category of injury alleged by plaintiffs. They contend that they and their employees will meet with concrete, significant economic harm if the court stays its injunction and allows the FTC to effect the do–not–call registry. Charitable groups seeking exemption from the do–not–call registry submitted opinion proof to the FTC that their potential donor pool would be reduced by forty to fifty percent if the registry applied to them. 68 Fed.Reg. 4634. This court, in its order of September 25, 2003, accepted an *estimate* that forty to sixty percent of telemarketing calls would be affected by the do–not–call registry. Mem. Op. & Ord., slip op. at 7, n.1. It is reasonable to believe that reductions of this magnitude would probably cause a corresponding loss of business to the industry and loss of jobs held by persons currently occupied in making the calls. Such monetary loss will never be remedied by an award of money damages, because the FTC cannot be ordered to post a bond, and plaintiffs' chances of prevailing in a damages lawsuit against the FTC for violating their constitutional rights appear minuscule, at best.

Although plaintiffs purport to quantify the loss by claiming that two million jobs will be lost, the court finds nothing in the record which justifies this specific inference. The court, however, must also evaluate plaintiffs' contention against what the FTC has offered in response—nothing. More importantly, the FTC cannot gainsay the general proposition that these plaintiffs, their employees, and other commercial telemarketers will suffer substantial economic injury if the FTC implements the do–not–call list, because it cannot

square such a denial with its current[1] claim that the registry will curtail eighty percent of unwanted telemarketing calls currently received by consumers. A preponderance of the evidence before the court shows that these plaintiffs, other similarly–situated commercial telemarketers, and persons employed by them will likely suffer devastating layoffs and other economic loss if the FTC implements the amended Rules as scheduled. There is no reason on this record to infer that employees can mitigate this loss by going to work for the charitable organizations and other groups exempted from the amended Rules. Moreover, because of the degree and nature of the probable injury, it will be difficult for plaintiffs to re-establish the *status quo ante* if the court allows the amended Rules to take effect, and appellate courts ultimately uphold the substance of this court's ruling, however inconceivable this outcome might be to the FTC and its supporters. It is unlikely, in such an event, that commercial telemarketers and their employees could simply re–group, dust themselves off, and proceed as they were before October 1, 2003.

2. WILL THE FTC SUFFER IRREPARABLE INJURY IF THE COURT WERE TO DENY THE MOTION TO STAY THE INJUNCTION?

The court concludes that the FTC itself will suffer no injury if the court refuses to stay its injunction, and the FTC does not argue to the contrary. Instead, it points to the

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[1] The FTC's estimate concerning the number of telemarketing calls which would be curtailed by the do–not–call list has crescendoed through the course of this lawsuit and taken on a life of its own with no reference to the factual record. The *current* eighty–percent estimate appears in the FTC's brief supporting its motion to stay. It appears that the estimate is an amalgam derived by assuming that the do–not–call registry would be applied to entities covered both by the Federal Communications Commission and by the FTC. There is nothing whatsoever in the administrative record or the record before this court, beyond the FTC's ipse dixit, to support this amalgam. The court thus rejects it.

probability that, if it is enjoined from implementing the registry, plaintiffs and others will continue to invade the residential privacy of the millions of persons who have indicated a preference for protecting that privacy by placing their numbers on the do–not–call registry. It is not clear to the court whether this question should be taken up here or in its consideration of where the public interest lies. Finding no helpful case law, the court will consider it here. The court has already stated, in the Order filed September 25, 2003, that "[t]he government's interest in protecting the well–being, tranquility, and privacy of the home is of the highest order in a free and civilized society." Weighing that interest and comparing it to the substantial and irreparable injury which plaintiffs will suffer if the court's injunction were stayed requires the court to determine and characterize the intrusion on residential privacy at issue in this case.

The intrusion upon residential privacy at issue here is the ringing of a telephone. That ringing may be more frequent than the consumer would like. It may come at times which are inconvenient. It may be disruptive. Unlike junk mail or electronic spam, it cannot be dealt with at a time chosen by the recipient. It is invariably unwanted and adds to the stress of daily life. It is difficult to conceive, however, how it does economic damage or inflicts physical injury. The intrusion on residential privacy here is properly regarded as severe, vexatious annoyance and inconvenience—nothing more and nothing less.

It is also important that there are ways of limiting the intrusion even if there is delay in implementing the federal registry while the issues are on appellate review. The parties agree that, as of August 2002, twenty–seven states had no–call lists similar to the registry proposed by the FTC. *See* 68 Fed.Reg. 4630. While this may be no comfort to persons in states without such regulations, there is no basis to believe that existing system of regulation will collapse while the issues are being resolved by appellate courts.

Similarly, all other telemarketing rules promulgated by the FTC remain in effect, including the company–specific do–not–call rules. As the FTC has succinctly stated on its home page[2] *(http://www.ftc.gov)*:

> * Consumers who don't want to receive telemarketing calls can limit them by telling companies to put their number on the company's do not call list. Write down the name of the company and the date that you asked to be put on its do not call list. You should not receive further calls from that company. This provision of the Telemarketing Sales Rule is still in force (as are all non–do–call [sic] provisions of the Rule). The FTC and its state partners are committed to enforcing the company–specific provisions of the Rule.
>
> * The company–specific do not call rules apply to all telemarketing calls.

Finally, if the FTC's suggestions are unavailing, the annoyance and inconvenience of this telephonic intrusion can be reciprocated or countered by a range of perfectly–legal actions best characterized under the rubric "self–help." These actions, many of which should be so obvious as to require no enumeration, are limited largely by the recipient's imagination and the degree of civility or courtesy by which with which any recipient feels constrained (which, the court has reason to believe, may not be much). Undoubtedly, none of these actions can compare to the breathtaking ease of eliminating telephonic intrusions (by commercial telemarketers, only) with the fell stroke of enlisting on the do–not–call registry, but they underscore the point that the type of injuries advanced by the FTC in support of the motion to stay are simply not irreparable and cannot be compared to the economic and first amendment injuries on the other side of the

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[2] Because of the impermanence and malleability of information appearing on web sites, the court has extracted the FTC's home page as it existed on September 26, 2003 and attached it to this order, for the record.

scale. Moreover, in contrast to the economic injuries posited by plaintiffs and discussed above, injuries sustained because of a wrongly–entered injunction will promptly end if and when appellate review establishes the wrongfulness of the injunction and the FTC implements the do–not–call registry.[3]

3. HAS THE FTC SHOWN THAT THE PUBLIC INTEREST WOULD BE HARMED WERE THE COURT TO DENY THE MOTION TO STAY THE INJUNCTION?

According to the FTC, the "public interest" here consists of the strong expectation on the part of "[t]ens of millions of consumers," who have already placed their names and numbers on the do–not–call registry, that this would "put a halt to the dinnertime din of unwanted telemarketing." This is recognized to be important, and nothing this court has done should be viewed as denigrating this expectation. Placing to one side the demonstrably false and patently illogical premise that prohibiting calls from only *commercial* telemarketers will "halt" unwanted calls from the other telemarketers and other mass callers exempted from regulation by the FTC, the FTC's view of the public interest is too short–sighted and ephemeral. Something more is at stake here. It is appropriate to recall words written by James Madison (characterized in countless civics books as the Father of the Constitution) in marking "where the public interest lies." *Hilton*, 481 U.S. at 776, 107 S.Ct. 2113.

In *Federalist No. 51,* Madison wrote:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to

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[3] The court notes the United States Court of Appeals for the Tenth Circuit has ordered, in a parallel case brought by these plaintiffs against the Federal Communications Commission, "that the petition for review on the merits be expedited, and that oral argument be scheduled on the petition at the earliest practical time." *Mainstream Marketing Services, Inc. v. FCC*, Case No. 03–9571, slip op. at 3 (10th Cir. Sept. 26, 2003).

> guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

The Federalist Papers, No. 51, at 323–24 (New American Library ed.1961). Freedom of speech, no matter how unpopular or disagreeable the message, is a right of every minority (including telemarketers), no matter how strong the majority's clamor for limitation or restriction. In the court's view, the public interest, rightly understood, lies in vigilantly prohibiting governmental rules which burden one type of speech, but not others, when the evil which the rule maker purports to address is as likely to be caused by the favored speech as by the burdened speech, or when the rule maker burdens one type of speech but not others because it is expedient, politically–possible, or popular to do so. The public interest, including the interest of the millions who have coalesced to join the do–not–call registry, is served in the long run by enjoining such rules if the government has not drawn the line properly. Conversely, that public interest would be harmed beyond measure were the court to acquiesce in the FTC's constricted, majoritarian view of the matter.

4. HAS THE FTC MADE A STRONG SHOWING THAT IT IS LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL?

The FTC concedes that the court properly chose to apply the constitutional analysis set forth in *Central Hudson* to evaluate the constitutionality of the FTC's registry under the First Amendment. Under *Central Hudson*, truthful commercial speech concerning lawful activity may be regulated if: (1) the government asserts a substantial interest in support of the regulation; (2) the government demonstrates that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly tailored.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564–565, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S.Ct. 2371, 2376, 132 L.Ed.2d 541 (1995). According to the FTC, although the court properly found a substantial government interest in protecting consumer privacy in the home, the court improperly evaluated whether the registry materially advances the FTC's interest in protecting this privacy. (*Id.*)

In its Order, the court found that the registry fails to materially advance the FTC's interest in consumer privacy because it only applies to commercial telemarketing calls, despite the fact that noncommercial telemarketing calls are equally invasive to consumer privacy. (Order at 22–26.) Additionally, the court found that the FTC has failed to provide a valid reason or government interest in distinguishing between commercial and noncommercial speech. Because the registry distinguishes between the indistinct, therefore, the court found it unconstitutional.

In challenging the court's analysis of whether the registry materially advances the FTC's privacy interest, the FTC first side–steps and argues that it has demonstrated a different valid interest in distinguishing between commercial and noncommercial telemarketing calls. (Def.'s Br. at 3.) Specifically, the FTC claims that it found that charitable telemarketers are less likely than commercial telemarketers to engage in abusive telemarketing practices, such as ignoring consumers' requests to be placed on company specific do–not–call lists. (*Id.*)[4] The FTC's newly–devised justification

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[4] The FTC now claims that it was never referring to fraud when it refers to abusive telemarketing practices, but rather the failure to comply with the company–specific do–not–call list. The FTC does, however, in both its brief and the administrative record, list fraud as one its reasons for distinguishing between commercial and noncommercial telemarketing in the application of the registry. (68 Fed.Reg. 4635 (January 29, 2003); Defs.' Mot. for Summ. J. at 28 [stating that not–for–profit corporations

finds no support in the evidence. The FTC claims that it came to this new conclusion based on its past experience with the company–specific do–not–call lists, which have applied to commercial telemarketers, *but not charitable and political telemarketers*, for the past eight years. (*Id.*) Because of the limited application of the company–specific requirements, *the FTC has gathered no evidence* concerning the issue of whether noncommercial telemarketers will fail to enforce company–specific do–not–call lists as those entities have been exempt from such requirements until recently. (*Id.*) The FTC's argument is not persuasive.

The FTC found that the company–specific do–not–call requirements were insufficient to protect consumer privacy. Although the company–specific requirements have applied solely to commercial telemarketers for the past eight years, the FTC cites no real evidence that it is the commercial nature of the calls which caused the company–specific requirements to fail in protecting consumer privacy. Instead, the FTC found:

> the company–specific approach is extremely burdensome to consumers, who must repeat their "do–not–call" request with every telemarketer that calls; consumers' repeated requests to be placed on a "do–not–call" list are ignored; consumers have no way to verify that their names have been taken off a company's calling list; consumers find that using the TCPA's private right of action is very complex and time–consuming, and places an evidentiary burden on the consumer who must keep detailed lists of who called and when; and finally, even if the consumer wins a lawsuit against a company, it is difficult for the consumer to enforce the judgment.

68 Fed.Reg. at 4629 (January 29, 2003) (cited by FTC in Def.'s Br. at 3). The problems with the company–specific

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and political fundraisers "are less likely to engage in the sorts of . . . deceptive acts or practices prohibited by the Telemarketing Act"].)

method create no basis upon which to distinguish between commercial and noncommercial speech in enactment of the do–not–call registry. Rather, the problems go to the nature of the company–specific method itself, as opposed to commercial telemarketers' reactions to the requirements.

Furthermore, even if the problems with the company–specific method related directly to commercial telemarketers' behavior, such problems would still not form the proper basis for distinction between commercial and noncommercial telemarketing in the registry. Basically, the FTC claims it can distinguish between commercial and noncommercial speech in the application of the registry because the FTC has no evidence from past experience that noncommercial telemarketers will behave like commercial telemarketers. Of course, the FTC has never attempted to regulate noncommercial telemarketers. The FTC's argument to advance its distinction between commercial and noncommercial speech is, therefore, a "we don't know," interest, founded on the government's own ignorance. The government body seeking to sustain a restriction on speech cannot satisfy this burden with speculation or conjecture but must demonstrate that the harm is real. *Edenfield v. Fane*, 507 U.S. 761, 770–771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993). Here, the FTC has not demonstrated that its interest justifies a distinction between commercial and noncommercial speech; instead, it speculates that the interest does.

Additionally, the FTC's argument is circular. It asserts that, because the FTC has always made illogical distinctions based on the content of speech in its telemarketing rules, it can continue to make these distinctions. The FTC cannot bootstrap a substantial government interest from its own previous regulatory behavior to justify content–discrimination under the First Amendment. Accordingly, the FTC's interest in improving upon its company–specific do–not–call method

does not justify a distinction between commercial and non-commercial telemarketing.[5]

Secondly, the FTC claims it has a likelihood of success on appeal because the court improperly analyzed *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). (Def.'s Br. at 4.) Specifically, the FTC claims that *Discovery Network* does not require the FTC to justify the exclusion of noncommercial speech from the registry's coverage through a reason related to the interest the registry is seeking to further. (*Id.*) According to the FTC, the court in *Discovery Network* found the regulation unconstitutional solely because of the minuscule percentage of news racks affected by the regulation in relation to the city's asserted goal, as opposed to the content–based distinction made by the regulation. (*Id.*)

The FTC is correct that the court found the regulation at issue in *Discovery Network* unconstitutional partly because it only achieved a numerically insignificant reduction in the number of news racks in the city. *Discovery Network*, 507 U.S. at 417, 113 S.Ct. at 1510. According to the Court, therefore, the city had not materially advanced its interest in beautification. The Court, however, also noted, "[n]ot only does Cincinnati's categorical ban on commercial news racks place too much importance on the distinction between com-

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[5] In a footnote, the FTC argues that another reason for its distinguishing between commercial and noncommercial telemarketing is that Congress found noncommercial telemarketing to be less intrusive to privacy when enacting the TCPA. In the administrative record, however, the FTC specifically found that all telemarketing calls, whether commercial or noncommercial, are intrusive to consumer privacy. 68 Fed.Reg. at 4637. Nowhere did the FTC find that noncommercial calls are less intrusive. Because under intermediate scrutiny the court may only consider those government interests asserted by the government, *Edenfield v. Fane*, 507 U.S. at 768, 113 S.Ct. at 1798, interests asserted by Congress under the TCPA are irrelevant to the constitutionality of the FTC's amended Rules.

mercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted." *Discovery Network*, 507 U.S. at 424, 113 S.Ct. at 1514. It further stated, "Cincinnati has not asserted an interest in preventing commercial harms . . . , which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Id.* at 426, 113 S.Ct. at 1515. Based on *Discovery Network*, therefore, the government interest asserted must bear some relationship to the distinction between commercial and noncommercial speech. Accordingly, this court finds *Discovery Network* does not indicate that the FTC has a likelihood of success on appeal.

Third, the FTC claims that the court failed to consider how lightly the do–not–call registry restricts speech, considering that consumers themselves choose whether to sign–up for the list. (Def.'s Br. at 4.) The court, however, did consider this characteristic of the registry in its Order when evaluating it under *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). As set forth in the Order, the FTC's actions sufficiently entangle the government in consumers' choices so as to implicate the First Amendment and require the government to demonstrate a substantial government interest for its distinction between commercial and noncommercial telemarketing. (Order at 19 [citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865 (2000)].) The FTC's attempt to re–hash the same argument does not demonstrate a likelihood of success on appeal of the registry's constitutionality.

Finally, the FTC argues that it has a likelihood of success on appeal because the court failed to consider cases from other circuits where courts upheld content–based distinctions in the commercial speech context. (Def.'s Br. at 5–8 [citing *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir.2003);

Anderson v. Treadwell, 294 F.3d 453 (2d Cir.2002); *Trans Union Corp. v. Fed. Trade Comm'n*, 267 F.3d 1138 (D.C.Cir.2001)].) The cases are distinguishable and do not show the FTC has a likelihood of success on appeal.

First, in the *Anderson* case, the Second Circuit reviewed the constitutionality of a New York statute that (1) prohibited real estate solicitations in areas that the Secretary of State determined had significant problems with intense and repeated solicitations by real estate brokers, and (2) enforced a do–not–solicit list of those individuals who did not want to be disturbed by real estate brokers. *Anderson*, 294 F.3d at 453. Although the Second Circuit found the statute constitutional under the First Amendment, *Anderson* is distinguishable from this case. The government in *Anderson* asserted an interest in privacy, as the FTC has in this case. *Anderson*, 294 F.3d at 461. However, in *Anderson* the New York Legislature had determined that real estate solicitations were a unique problem to consumer privacy, over and above other commercial solicitations, due to the phenomenon known as "blockbusting." *Id.* at 462. "Blockbusting" is a practice whereby real estate brokers engage in aggressive solicitation of homeowners by fanning racial tensions and promoting panic–selling. *Id.* at 457. The court, therefore, found that the government had a reason related to its interest to distinguish between different types of commercial speech, unlike the FTC in this case. In fact, the Second Circuit explicitly distinguished *Anderson* from *Discovery Network* on this basis and found that a distinction between types of commercial speech based on a legitimate reason is unlike a distinction between commercial and noncommercial speech for First Amendment purposes. *Id.* at 463–464. Here, the FTC has not demonstrated that commercial telemarketing calls are a unique problem over and above noncommercial telemarketing calls. Rather, the FTC has conceded just the opposite. 68 Fed.Reg. 4637. Because Anderson is distinguishable from

this case, therefore, it does not show that the FTC has a likelihood of success on appeal.

Similarly, *Trans Union Corporation* is distinguishable from this case. In *Trans Union Corporation*, the District of Columbia Circuit upheld the constitutionality of a provision in the Fair Credit Reporting Act ("FCRA"), which permitted the sale of consumer reports to facilitate offers of credit or insurance but not to facilitate offers of other goods or services. *Trans Union Corp.*, 267 F.3d at 1138. The FTC in *Trans Union Corporation* asserted an interest in protecting personal financial data, while facilitating credit pursuant to the purpose of FCRA. *Id.* at 1142–1143. The District of Columbia Circuit found that the interest in protecting personal data while facilitating credit entirely supported the distinction between offers of credit and offers of goods and services. *Id.* at 1143. Unlike in this case, therefore, the government interest supported the distinction between different types of speech. Additionally, *Trans Union Corporation* only dealt with distinctions between types of commercial speech, as opposed to commercial and noncommercial speech as in this case. Accordingly, because the *Trans Union Corporation* case is readily distinguishable from this case, it does not show that the FTC has a likelihood of success on appeal.

Finally, in the *American Blast Fax* case, the Eight Circuit upheld the constitutionality of a provision in the Telephone Consumer Protection Act ("TCPA"), which bans unsolicited, commercial facsimiles but not unsolicited, noncommercial facsimiles. *Am. Blast Fax, Inc.*, 323 F.3d at 649. The government asserted an interest in preventing unwanted facsimile advertising from shifting advertising costs to unwilling consumers and interfering with the reception of their facsimile machines. *Id.* at 654. Additionally, the government noted, as a basis for distinguishing between commercial and noncommercial speech, that Congress had found, in enacting

the TCPA, that noncommercial calls are less intrusive to consumers than commercial calls because they are more expected. *Id.* at 655–656. The Eighth Circuit, deferred to this congressional finding. Here, in contrast, the court has found that the FTC has no valid reason to distinguish between commercial and noncommercial telemarketing. *See* discussion at n. 5 *supra*. The FTC cannot concoct a reason through speculation or conjecture but must demonstrate that the harm of commercial speech when compared to noncommercial speech is real. *See Edenfield,* 507 U.S. at 770–771, 113 S.Ct. at 1800.

The Seventh Circuit's analysis in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir.1998) is the most persuasive case to this court in determining the FTC's likelihood of success on appeal. In *Pearson*, the Illinois Legislature passed a statute creating a do–not–solicit list prohibiting real estate brokers from soliciting homeowners who put their names on the list. *Id.* at 399. Illinois asserted an interest in protecting consumer privacy and ending "blockbusting." *Id.* at 402. Instead of accepting Illinois' conjecture that "blockbusting" was a unique problem justifying a distinction between real estate and other commercial solicitations, the court found that Illinois had demonstrated no evidence that "blockbusting" occurred with any frequency in Illinois. *Id.* The Seventh Circuit found, therefore, that the only valid interest asserted by the government to justify its content–based distinction was the concern for consumer privacy. *Id.* Because other commercial solicitations are as intrusive to consumer privacy as real estate solicitations, the court struck down the statute as unconstitutional. *Id.* at 405. Since *Pearson* is the case most analogous to the case before the court, the court finds that no authority from other circuits supports the FTC's assertion that it has a likelihood of success on appeal. Accordingly, the court holds that this factor in determining whether to grant a stay of the court's Order weighs against granting a stay.

5. CONCLUSION

Two matters must be addressed before this order is filed. First, as an overall justification for its motion, the FTC relies heavily on an unpublished Order entered September 26, 2003, by the United States Court of Appeals for the Tenth Circuit in *Mainstream Marketing Services, Inc. v. FCC*, Case No. 03–9571 (10th Cir. Sept. 26, 2003). There, in a parallel case brought by these plaintiffs to review do–not–call rules propounded by the Federal Communications Commission, the Tenth Circuit denied plaintiffs' request for a stay of the FCC's rules pending the appellate court's review on the merits. According to the FTC, the ruling controls the outcome of this case.

The court is mindful and respectful of an order entered by a panel of the court which will decide the issues presented on appeal of this case. Because the Order is apparently unpublished, however, it is not binding in the sense that a published opinion is binding. *See* 10th Cir. R. 36.3. More important, the FTC's argument overlooks the entirely different procedural posture of the two cases. It does not appear that the matter before the Tenth Circuit has been argued on the merits or even briefed. *See Mainstream Marketing Services, Inc. v. FCC*, Case No. 03–9571, slip op. at 3 (10th Cir. Sept. 26, 2003) (ordering expedited argument and briefing). In contrast, this court has had the benefit of extensive briefing and an opportunity to address the merits of the case. It has also reviewed the FTC's administrative record and factual materials submitted by the parties on cross–motions of summary judgment. It is not clear whether any administrative record is currently before the appellate court. Indeed, because the FTC has taken the lead on the issue, it is not clear whether the FCC made a separate record or relied to some extent on the FTC record. Finally, it does not appear that the parties made available to the Tenth Circuit the information available to this court on the issues of irreparable

injury to plaintiffs, injury to others, and the public interest which is before this court. Because of this different procedural context, the court declines the invitation to give the appellate Order controlling effect here.

There is a second matter which the court must address before concluding this order. Citing news reports, plaintiffs suggest that the FTC is violating the September 25, 2003 Order by continuing to solicit persons to sign up for the national registry. Plaintiffs also claim that the FTC is attempting to side–step the Order by providing its registry to the FCC for implementation on October 1, 2003. The court regards the terms of its injunction and judgment as reasonably clear and specific: the FTC is prohibited from "creating and implementing" its do–not–call registry. The court assumes that the FTC is familiar with the substantial body of case law to the effect that a person enjoined cannot do indirectly through another what it is prohibited from doing directly. The FTC has appealed this court's ruling, as is its legal right, and the court will not assume, on the basis of news reports, that it will risk collateral proceedings by also trying to skirt the Order.

Upon the foregoing findings and conclusions, it is ORDERED that Defendant Federal Trade Commission's Motion for an Emergency Stay Pending Appeal is hereby DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
D. COLORADO

[Filed Sept. 25, 2003]

No. CIV. A. 03 N 0184

MAINSTREAM MARKETING SERVICES, INC., a Colorado corporation; TMG MARKETING, INC., a Colorado corporation; and AMERICAN TELESERVICES ASSOCIATION,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION; TIMOTHY J. MURIS, Chairman of the FEDERAL TRADE COMMISSION, in his official capacity; SHEILA F. ANTHONY, Commissioner, FEDERAL TRADE COMMISSION, in her official capacity; MOZELLE W. THOMPSON, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; Orson Swindle, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; THOMAS B. LEARY, Commissioner, FEDERAL TRADE COMMISSION, in his official capacity; and J. HOWARD BEALES III, Director, Bureau of Consumer Protection, in his official capacity,

Defendants.

MEMORANDUM OPINION AND ORDER

NOTTINGHAM, *District Judge*.

This case concerns the validity and constitutionality of the Federal Trade Commission's amended Telemarketing Sales Rules (hereinafter "amended Rules"). The amended Rules create a federal registry consisting of names and telephone

numbers of consumers who have indicated, by placing their name and number on the registry, that they do not wish to receive unsolicited telephone calls from those marketers to whom the amended Rules apply. This is commonly known as a do–not–call registry because the amended Rules prohibit certain types of telemarketers from calling those telephone numbers. The amended Rules also prohibit calls that, to make mass calling more efficient, are dialed by equipment and subsequently dropped when answered by the consumer because the salesperson is delayed on a previous call. These calls are denominated in the telemarketing industry as abandoned calls.

Plaintiffs allege that, when the FTC promulgated the amended Rules, it (1) violated the First and Fifth Amendments to the United States Constitution; (2) exceeded its statutory authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C.A. §§ 6101–6108 (West 1998 & Supp.2003) (hereinafter "Telemarketing Act"); and (3) acted arbitrarily and capriciously under the Administrative Procedure Act, 5 U.S.C.A. § 551 (West 1996 and Supp.2003) ("APA"). This matter is before the court on (1) "Plaintiffs' Motion for Summary Judgment," filed May 2, 2003, (2) "Defendants' Cross–Motion for Summary Judgment," filed May 30, 2003, and (3) the parties' "Consent Motion for Leave To Amend Complaint," filed August 5, 2003. Because it is uncontested and plainly proper under the federal rules, the motion to amend will be granted without discussion. Jurisdiction is based on the existence of a federal question. *See* 28 U.S.C.A. § 1331 (West 1993 & Supp.2003).

FACTS

1. Factual and Statutory Background

Many different organizations, including businesses, charities, religious groups, and political parties, generate revenue by calling individuals in their homes and soliciting sales and donations. This practice, known as telemarketing, has grown

into an industry that generates $275 billion dollars annually and employs roughly 5.4 million persons in the United States. (Mem. Supp. Pls.' Mot. for Summ. J. at 7 [filed May 2, 2003] [hereinafter "Pls.' Br."]) Organizations perform their telemarketing activities in a variety of ways. Some utilize their own employees or volunteers to perform telemarketing activities. Others hire independent telemarketing companies that operate call–centers to make solicitations on their behalf. Plaintiffs Mainstream Marketing and TMG are independent telemarketing companies based in Colorado. (First Am. Compl. for Decl. and Inj. Relief ¶¶ 14, 17–18 [filed August 5, 2003] [hereinafter "Am. Compl."].) Plaintiff American Teleservices Association is a national non–profit association of telemarketing companies which represents its members' commercial interests and engages in self–regulation of the industry. (*Id.* ¶ 19; Pls.' Br. at 8.)

In 1991, Congress passed the Telephone Consumer Protection Act of 1991 ("TCPA"), wherein it granted the Federal Communications Commission the authority to promulgate rules creating a procedure to protect telephone subscribers from receiving unwanted telemarketing calls. 47 U.S.C.A. §§ 227(c)(1)(A)–(E), (c)(3) (West 2001 & Supp. 2003). The TCPA suggests the creation of a national database as a method of preventing subscribers' reception of unwanted calls, but it does not require the FCC to implement such a do–not–call list. *Id.* By its own terms, the TCPA prohibits telemarketers from (1) using automatic telephone dialing systems to make calls or send prerecorded messages to emergency lines, hospital and elderly home lines, and cellular telephone lines, and (2) making any calls with prerecorded messages to any line unless the FCC chooses to exempt the particular type of telemarketer making the call. *Id.* § 227(b)(1)(A). Finally, the TCPA grants the FCC the limited authority to exempt telemarketers making

> calls that are not made for a commercial purpose; and such . . . calls made for a commercial purpose that the

> Commission determines will not adversely affect the privacy rights that this section is intended to protect, and do not include the transmission of any unsolicited advertisement.

Id. § 227(b)(2)(B). As of January 2003, when this case was filed, the FCC had utilized this grant of authority to pass rules creating company–specific do–not–call lists and prohibiting use of automatic telephone dialers and prerecorded messages, but it had not yet adopted rules creating a national database for a do–not–call registry. 47 C.F.R. § 64.1200 (2002).

In 1994, Congress enacted the Telemarketing Act, wherein it granted the FTC the authority to promulgate rules prohibiting "deceptive or abusive telemarketing practices." 15 U.S.C.A. § 6102. Congress specifically found that consumers were being increasingly victimized by telemarketing fraud and other abuses, and it required the FTC in promulgating its rules to (1) define "deceptive telemarketing acts or practices," (2) prohibit abusive patterns of unsolicited telephone calls, (3) restrict the hours of the day when telemarketing calls may be placed, and (4) require telemarketers to promptly disclose to call recipients the nature of their call. *Id.* § 6102(2)–(3). In response to this mandate, the FTC adopted the Telemarketing Sales Rules (the "Rules") on August 16, 1995. 16 C.F.R. Part 310; 60 Fed.Reg. 43842 (August 23, 1995). These Rules prohibit credit card laundering, mandate prompt disclosure of the nature of the call, and prohibit, among other things, threatening or repetitive calls 16 C.F.R. §§ 310.3, 310.4 (2003).

On two occasions in 2002, the FTC proposed revisions to the Rules. In January 2002, the FTC issued a notice of proposed rule making, suggesting a revision of the Rules and the creation of a do–not–call registry. 67 Fed.Reg. 4492 (January 30, 2002). In May 2002, the FTC issued another notice of proposed rule–making which would further amend the Rules to impose fees on telemarketers for access to the do–not–call registry. 67 Fed.Reg. 37362 (May 29, 2002).

In December 2002, the FTC issued the amended Rules which are the subject of this case. The amended Rules prohibit "deceptive or abusive telemarketing acts or practices." 16 C.F.R. § 310.4(b). Included among the definitions of an "abusive telemarketing act"is the following:

> initiating any outbound telephone call to a person when . . . that person's telephone number is on the 'do–not–call' registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls *to induce the purchase of goods or services* . . . .

Id. § 310.4(b)(1)(iii)(B)(emphasis added). Under the amended Rules, consumers may add their names and telephone numbers to a registry of numbers. *Id.* All telemarketers are prohibited from making calls to numbers on the registry to induce the purchase of goods and services. *Id.* An exception is made for businesses that have obtained prior written consent from the consumer, or have "an established business relationship" with the consumer, defined as a business transaction occurring in the previous eighteen months. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i)–(ii). Also ex-empted from the do–not call requirements are those businesses beyond the jurisdictional reach of the FTC, including banks, insurance companies, and common carriers. 15 U.S.C.A. § 6105. Finally, the amended Rules contain an exemption which is critical to this case. They exempt from the do–not–call registry organizations soliciting charitable contributions. 16 C.F.R. § 310.6(a).

The amended Rules also define abusive telemarketing practices as

> abandoning any outbound telephone call. An outbound telephone call is 'abandoned' under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

Id. § 310.4(b)(1)(iv). A telemarketer is allowed to abandon the occasional call under the amended Rules if

> the telemarketer employs technology that ensures abandonment of no more than three (3%) percent of all calls answered by a person, measured per day per calling campaign, and whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed.

Id. § 310.4(b)(4)(i)–(ii). The amended Rules go into effect on October 1, 2003. (Pls.' Br., Statement of Undisputed Material Facts ¶ 13); *admitted at* Defs.' Mem. of Points and Authorities in Supp. of its Cross–Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J., Resp. to Statement of Undisputed Material Facts ¶ 13 [filed May 30, 2003] [hereinafter "Defs.' Br."].

In promulgating the amended Rules, the FTC sought to protect the consumer's right to privacy in his own home and the right to be free from unwanted telephone calls. 68 Fed.Reg. at 4635. To that end, the FTC established the do–not–call registry requirements for all *commercial* telemarketing calls. *Id.* at 4635. Specifically, the FTC found that the previous company–specific do–not–call rules, which permitted a consumer to request that his name be removed from a company's call list, were insufficient to protect consumers from unwanted calls for several reasons. *Id.* at 4629. First, the FTC found that telemarketers interfered with consumers' attempts to be placed on company–specific lists by hanging up on them or ignoring their request. *Id.* Additionally, the FTC noted that (1) the prior practice placed too much burden on consumers who had to repeat their do–not–call request with every telemarketer who called; (2) the company–specific list continually exposed consumers to unwanted initial calls

which had significantly increased in numbers since adoption of the original FTC Rules; and (3) consumers had no method to verify that their name had been removed from the company's list. *Id.*

As noted previously, the FTC exempted charitable organizations from the do–not–call requirements. In doing so, it cited the heightened First Amendment protection afforded charitable speech. *Id.* at 4586, 4635 Additionally, the FTC found that abusive telemarketing practices, which the registry sought to combat, were more likely to be undertaken by commercial telemarketers than those soliciting charitable and political contributions. *Id.* at 4635, 4637. The FTC admitted, however, that the interest of protecting privacy did not justify a distinction between commercial and charitable telemarketing calls because privacy was equally invaded regardless of the speech content of the telephone call. *Id.* Estimates indicate that forty to sixty percent of telemarketing calls will be affected by the do–not–call list.[1] (Pls.' Br. at 10; Pls. Reply at 27.)

On March 11, 2003, after the FTC announced its amended Rules, Congress enacted the Do–Not–Call Implementation Act ("Implementation Act"). Pub.L. No. 108–10, 7 Stat. 557 The Implementation Act provides

> The Federal Trade Commission may promulgate regulations establishing fees sufficient to implement and

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[1] There is no exact estimate of the number of calls that will be reduced in the administrative record or elsewhere. There are estimates, however, of the percentage reduction of telemarketing business and employment. The FTC faults the telemarketing industry for refusing to provide the FTC with the information necessary to estimate the percentage reduction in calls. Plaintiffs fault the FTC for failing to engage in proper research of the issue before promulgating the regulations. For purposes of this ruling, the court will consider the telemarketing industry's estimate of percentage reduction in business as the proper measure of the do–not–call registry's effect on telemarketing calls.

> enforce the provisions relating to the 'do–not–call' registry of the Telemarketing Sales Rule (16 C.F.R. § 310.4(b)(1)(iii)), promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. §§ 6101 et seq.). . . . Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that it began on September 18, 2002, under the Telephone Consumer Protection Act (47 U.S.C. §§ 227 et. seq.). In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 C.F.R. § 310.4(b)).

Id. Pursuant to the Implementation Act and the Telemarketing Act, the FTC, on April 3, 2003, announced its intention to charge a fee to companies subject to the FTC's do–not–call registry for access to the numbers on the registry. 68 Fed.Reg. 16238 (April 3, 2003).

Similarly, pursuant to the Implementation Act and the TCPA, the FCC recently announced its intention to adopt rules similar to the FTC's, enforcing the do–not–call list. On July 25, 2003, the FCC promulgated rules mirroring the FTC's amended Rules and adding entities subject to the do–not–call restrictions, to include those beyond the reach of the FTC's jurisdiction, such as banks, insurance companies, and common carriers. 68 Fed.Reg. 44144 (July 25, 2003); 47 C.F.R. 64.1200 (2003). The FCC do–not–call rules, like the FTC's, do not apply to entities making calls on behalf of nonprofit organizations. *Id.* § 64.1200(f)(9).

On July 31, 2003, the FTC promulgated its final rule concerning the fees imposed on entities accessing the national do–not–call registry, to be codified at 16 C.F.R. § 310.8 (2003). 68 Fed.Reg. 45134 (July 31, 2003). These new fee Rules provide that any seller wishing to initiate, or cause any

telemarketer to initiate, an outbound telephone call to any person in a particular area code, must first pay a fee for access to the do–not–call registry pertaining to that area code. 16 C.F.R. § 310.8(a). The rules further states:

> The annual fee . . . is $25 per area code of data accessed, up to a maximum of $7,375; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in, or causing others to engage in, outbound telephone calls to consumers and who is accessing the National Do–Not–Call Registry without being required under this Rule, 47 C.F.R. § 64.1200, or any other federal law.

Id. § 310.8(a).

2. Procedural Background

Plaintiff filed a complaint in this court for declaratory and injunctive relief on January 29, 2003, seeking an injunction prohibiting the FTC's application and enforcement of its amended Rules. (Compl. for Decl. and Inj. Relief [filed January 29, 2003] [hereinafter "Compl."].) On February 28, 2003, plaintiffs filed a motion for a preliminary injunction, arguing that their likelihood of success in their case mandated issuance of a preliminary injunction. (Pls.' Mot. for Prelim. Inj. [filed February 28, 2003] [hereinafter "Mot. for Prelim. Inj."].) Plaintiffs withdrew this motion on May 23, 2003, after filing their motion for summary judgment on May 2, 2003. (Notice by Pls. of Withdrawal of Pls.' Mot. for Prelim. Inj. [filed May 23, 2003]; Pls.' Br.)

On August 5, 2003, plaintiffs filed a consent motion to amend their complaint to state claims against the FTC based on the new fee Rules and to withdraw all claims against individual defendants, other than the FTC. (Consent Mot. for Leave To Am. Compl. [filed August 5, 2003] [hereinafter "Mot. to Am. Compl."].) In their proposed first amended

complaint, plaintiffs allege that the fee violates the First Amendment and the APA. (Am. Compl. ¶¶ 172–182.) At a status conference on August 11, 2003, the court allowed the parties an opportunity to supplement their cross–motions for summary judgment, based on the new claims asserted in plaintiffs' proposed amended complaint. On August 21, 2003, plaintiffs and defendants filed supplemental memoranda supporting their opposing positions regarding the lawfulness of the FTC's new fee Rules. (Supplemental Mem. Supp. Pls.' Mot. for Summ. J. [filed August 21, 2003] [hereinafter "Pls.' Supp. Br."]; Defs.' Mem. of Points & Authorities in Supp. of its Mot. for Summ. J. with Respect to Counts 9–11 of the First Am. Compl. [filed August 21, 2003] [hereinafter "Defs.' Supp. Br."].)

ANALYSIS

In their motion for summary judgment, plaintiffs dub the amended Rules an act of "regulatory imperialism," which borrows from the reasoning of the pigs in George Orwell's "Animal Farm." (Pls.' Br. at 2, 31 ["Some animals are more equal than others"]) Specifically, plaintiffs argue that the amended Rules concerning the do–not–call registry and fees violate the First and Fifth Amendments by (1) imposing a prior restraint on speech, (2) discriminating based on speech content, and (3) failing to forward a substantial interest, materially advance the state's interest, or create narrowly tailored remedies. (Pls.' Br. at 23–48; Pls.' Supp. Br. at 13–25.) Secondly, plaintiffs claim that the FTC does not have authority from Congress under the Telemarketing Act to promulgate the amended Rules because the creation of a do–not–call registry and regulation of abandoned calls were powers specifically granted to the FCC under the TCPA, not the FTC under the Telemarketing Act. (Pls.' Br. at 48–59.) Plaintiffs finally argue that the FTC's promulgation of the amended Rules and fee provisions was arbitrary and capricious because the rules are unsupported by the record

and comments that were before the FTC at the time of promulgation. (*Id.* at 59–67; Pls.' Supp. Br. at 25–28.)

Defendants filed a response to plaintiffs' motion for summary judgment and their own motion for summary judgment on May 30, 2003. (Defs.' Br.) Defendants counter that the amended Rules pass First Amendment constitutional muster under the test for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). (*Id.* at 18, 23–37.) Additionally, defendants claim the Telemarketing Act does grant the FTC the authority to create a do– not–call registry and regulate abandoned calls. (*Id.* at 14–17, 44–49.) Defendants finally claim that the FTC's promulgation of the amended Rules was not arbitrary and capricious because the FTC considered over 64,000 comments and made clear findings justifying the amended Rules in the rulemaking record at 68 Fed.Reg. at 4580–4679. (*Id.* at 38–43.)

1. Standard for Summary Judgment & Review of Agency Action

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir.1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for

trial on a material matter." *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Celotex Corp.*, 477 U.S. at 325, 106 S.Ct. at 2554). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553; *see* Fed.R.Civ.P. 56(e).

A genuine issue of fact does not exist, and summary judgment is appropriate, if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. If the nonmoving party's evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Id.* at 249, 106 S.Ct. at 2511 In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one–sided that one party must prevail as a matter

Id. at 252, 106 S.Ct. at 2512. The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La–Z–Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir.1985). Additionally, the court, when ruling on a motion for summary judgment, must construe the facts in the light most favorable to the nonmoving party. *Id.* Here, the parties agree that there is no dispute as to any material fact and that summary judgment is appropriate as a matter of law. Accordingly, this court's role is to apply the law to the undisputed facts.

When a court reviews agency action, the reviewing court shall

> hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right
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5 U.S.C.A. § 706(2)(A)–(C) (West 1993 & Supp.2003). Here, the court is called upon to review the FTC's actions under the Constitution, statute, and the APA. Accordingly, the court is mindful of separate and distinct standards of review in this case. Each standard is addressed in turn.

2. *First Amendment*

Plaintiffs claim that the rules creating the do–not–call registry and establishing fees to access the registry violate the First Amendment to the United States Constitution. Under the APA, the court must therefore determine whether the FTC's rules are "contrary to constitutional right." 5 U.S.C.A. § 706(2)(B); *U.S. West, Inc. v. Fed. Communications Comm'n*, 182 F.3d 1224, 1231 (10th Cir.1999), *cert denied sub nom. Competition Policy Inst. v. U.S. WEST, Inc.*, 530 U.S. 1213, 120 S.Ct. 2215, 147 L.Ed.2d 248 (2000). In contrast to the situation where a rule is asserted to be improper when measured against the enabling statute, the court owes no deference to the agency's position that the rule is a permissible interpretation of the Constitution. *See, e.g., Hill v. Nat'l Transp. Safety Bd.*, 886 F.2d 1275, 1278 (10th Cir.1989); *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979). If the court determines that the amended Rules violate the First Amendment, they must be invalidated.

The FTC's do–not–call registry provides consumers with a procedure by which to refuse and prevent all commercial calls by telemarketers to their residential phone line. 16 C.F.R. § 310.4(b). By signing up for the do–not–call list, a consumer indicates he will not accept commercial calls by telemarketers. A consumer cannot use the list, however, to prevent calls from charitable organizations or businesses with which the consumer has had a relationship in the past eighteen months. *Id.* § 310.6(a). Instead, the consumer must independently notify these entities that the consumer does not wish to receive calls from them. In this regard, the FTC has

established a mechanism by which a consumer may refuse commercial, but not other types of, speech.

Commercial speech is defined as speech that proposes a financial transaction. *Central Hudson*, 447 U.S. at 562, 100 S.Ct. at 2349. There is no doubt that the First Amendment protects this type of speech from unwarranted government regulation. *Id.* at 561, 100 S.Ct. at 2350. The First Amendment's concern for commercial speech is based on the informational function of advertising. *Id.* at 563, 100 S.Ct. at 2350. "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561–562, 100 S.Ct. at 2349. In applying the First Amendment to commercial speech, the Supreme Court has rejected the highly paternalistic view that the government should be involved in assessing the value of, and determining, what consumers should and should not hear. *Id.; Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543 (1993). This view stems from a belief that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–482, 115 S.Ct. 1585, 1589, 131 L.Ed.2d 532 (1995) (quoting *Virginia Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 96 S.Ct. 1817, 1826 ([1976]).)

Despite the value of commercial speech, however, it is afforded lesser protection under the First Amendment than other types of speech, such as speech soliciting donations for political or charitable causes. *Central Hudson*, 447 U.S. at 562, 100 S.Ct. at 2349; *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980). Charitable solicitation of funds does more than inform private economic decisions because it involves the dissemination of views and the advocacy of political and social causes. *Village of Schaumburg*, 444 U.S. at 632, 100

S.Ct. at 834. It is, therefore, protected more highly than commercial speech. Commercial speech also receives lesser protection because, to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the First Amendment's guarantee with respect to the latter kind of speech. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S.Ct. 2371, 2375, 132 L.Ed.2d 541 (1995).

The protection afforded commercial speech under the First Amendment depends upon the nature of the speech and the government interests served by its regulation. *Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. The First Amendment does not protect commercial speech that is untruthful or concerns unlawful activity. *Id.; Florida Bar*, 515 U.S. at 623, 115 S.Ct. at 2375. Commercial speech that falls into neither of those categories may be regulated, however, if: (1) the government asserts a substantial interest in support of the regulation; (2) the government demonstrates that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly tailored. *Central Hudson*, 447 U.S. at 564–565, 100 S.Ct. at 2351; *Florida Bar*, 515 U.S. at 624, 115 S.Ct. at 2376. The court applies intermediate scrutiny—somewhere between the "least–restrictive means" test used in some cases involving freedom of the press and the "rational basis" test used in fourteenth amendment equal protection analysis—in making the determination whether a regulation of commercial speech offends the First Amendment. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2351; *Florida Bar*, 515 U.S. at 623, 115 S.Ct. at 2375.

A. Do the Amended Rules Amount to Governmental Restriction on Lawful Commercial Speech

Before applying the three prong test enumerated in *Central Hudson*, the court must determine whether the FTC's do–not–

call registry and fee Rules qualify as a type of regulation implicating the First Amendment. Specifically, the regulations must amount to a government restriction on lawful and truthful commercial speech. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2351. The amended Rules amount to a government restriction on lawful and truthful commercial speech for several reasons.

First, the do–not–call registry affects lawful and truthful commercial speech that is protected under *Central Hudson*. The do–not–call registry and its fees apply to all "outbound telephone calls to induce the purchase of goods and services." 16 C.F.R. § 310.4(b)(1)(iii)(B). "Solicitations to induce charitable contributions" are not covered by the registry, and "charitable contributions" are defined as "any donation or gift of money or any other thing of value." *Id.* §§ 310.2(f), 310.6(a). Since the registry and its fees only apply to speech intended to induce the purchase of goods and services, the regulations only apply to speech proposing a financial transaction, or commercial speech, as it is defined under the First Amendment. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2351. Additionally, the regulations refer to all commercial speech without regard to truthfulness or lawfulness and, therefore, concern lawful commercial speech which is protected by the First Amendment. *Id.; Florida Bar*, 515 U.S. at 623, 115 S.Ct. at 2375.

A more troubling question is whether the regulations are a "government restriction" on speech that even implicates the First Amendment. The amended Rules do not restrict speech by explicitly and directly limiting it. Instead of placing an outright ban on commercial telemarketing calls, the FTC has merely provided a mechanism by which the individual can choose to ban all commercial telemarketing calls to his residence. The Supreme Court addressed the constitutionality

of a similar regulation in *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).[2]

In *Rowan*, the Court upheld a statute which allowed an addressee to refuse mail from any sender by notifying the local postmaster, who then instructed the sender to remove the addressee's name and address from its mailing list under penalty of law. *Rowan*, 397 U.S. at 738, 90 S.Ct. at 1491. The court found that the statute did not violate the First Amendment because the purpose of the statute was to eliminate governmental involvement in any determination concerning the content of the materials and to allow the addressee complete and unfettered discretion in electing what speech he desired to receive. *Id.* at 738, 90 S.Ct. at 1491 The First Amendment right to speak was only circumscribed by an affirmative act--the addressee's giving notice that he no longer wished to receive mail from the sender. *Id.* at 737, 90 S.Ct. at 1490. The court categorically rejected the argument that a vendor has the right to send unwanted material into the home of another and found that the statute did not operate as a government restriction on speech. *Id.* at 738, 90 S.Ct. at 1491. Accordingly, the statute in *Rowan* was upheld as constitutional. *Id.*

Relying on *Rowan*, the FTC argues that any burden imposed on commercial speech by the do–not–call registry is imposed by the actions of individual consumers rather than the government. (Defs.' Br. at 18–19.) According to the FTC, the do–not–call registry, like the statute in *Rowan*, does not implicate First Amendment concerns because the government

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[2] In *Rowan*, the Supreme Court did not address the applicability of the *Central Hudson* test to the statute in question. Instead, the court held at the outset that the government was not sufficiently involved in restricting speech to implicate First Amendment concerns. *Rowan*, 397 U.S. at 738, 90 S.Ct. at 1491. Because *Rowan* did not apply the *Central Hudson* test, the court in this opinion will address the questions raised by *Rowan* prior to analysis under Central Hudson.

is not sufficiently involved in determining what speech an individual does and does not hear. Plaintiffs argue that the registry system favors one kind of speech over another and manipulates consumer choice, unlike the statute in *Rowan*, making it a government restriction implicating the First Amendment. (Pls.' Br. at 27–29.)

The court rejects the FTC's position and holds that the do–not–call registry sufficiently involves the government in the regulation of commercial speech to implicate the First Amendment and require the application of the *Central Hudson* test. An important distinction between *Rowan* and this case is that, in *Rowan*, the individual had complete autonomy to prevent any chosen material from entering his home. The government's regulation had no bearing on this choice. *Rowan*, 397 U.S. at 728, 90 S.Ct. at 1484. In fact, the Supreme Court specifically stated:

> Both the absoluteness of the citizen's right under [the statute] and its finality are essential . . . . In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents . . . . Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions . . . .

Rowan, 397 U.S. at 737, 90 S.Ct. at 1491

Here, however, the FTC, by exempting charitable solicitors from the amended Rules' do–not–call registry, has imposed a content–based limitation on what the consumer may ban from his home. Although the consumer does retain the choice whether to sign up for the registry, the government has removed the absoluteness of that autonomy by itself exempting certain types of speech from the restrictions of the registry. Any consumer who desires to refuse all telemarketing calls, commercial and noncommercial, cannot enforce that preference. Although these consumers may refuse calls for charitable contributions through the company–specific

list, telemarketing calls soliciting charitable contributions will ring through to the consumer, while commercial calls will not. The mechanism purportedly created by the FTC to effectuate consumer choice instead influences consumer choice, thereby entangling the government in deciding what speech consumers should hear. This entanglement creates a regulatory burden on commercial speech.

Furthermore, the fact that the do–not–call registry is not an outright government ban on commercial speech does not mean that it is not a burden implicating the First Amendment. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865 (2000). "The distinction between laws burdening and laws banning speech is but a matter of degree. The government's content–based burdens must satisfy the same rigorous scrutiny as its content–based bans." *Id.* Based on the holdings in *Rowan* and *Playboy Entertainment Group*, the court determines that the do–not–call registry is a significant enough governmental intrusion and burden on commercial speech to amount to a government restriction implicating the First Amendment. The test enumerated in *Central Hudson* must, therefore, be applied in determining the constitutionality of the FTC's amended Rules.

B. Are the Amended Rules Justified by a Substantial Government Interest?

Under the *Central Hudson* test, the party seeking to uphold a restriction on commercial speech carries the burden of justifying it with a substantial interest. *Edenfield*, 507 U.S. at 770, 113 S.Ct. at 1800. The government body seeking to sustain a restriction on speech cannot satisfy this burden with speculation or conjecture but must demonstrate that the harm is real. *Id.* at 770–771, 113 S.Ct. at 1800. Unlike other standards of constitutional review, intermediate scrutiny requires the court to examine only the government interest set forth by the government; the court cannot consider other

possible interests in determining the regulation's constitutionality. *Id.* at 768, 113 S.Ct. at 1798. Here, the FTC asserts that it has an interest in protecting the privacy of those who indicate they do not wish to receive telephone calls from telemarketers in their homes. (Defs.' Br. at 23.) Additionally, the FTC claims that it has a substantial interest in curbing deceptive and abusive telemarketing practices. (Defs.' Br. at 29.)

The government's interest in protecting the well–being, tranquility, and privacy of the home is of the highest order in a free and civilized society. *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S.Ct. 2495, 2502, 101 L.Ed.2d 420 (1988) (citing *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 2296 [(1980)].) Accordingly, the Supreme Court has recognized that "[p]reserving the sanctity of the home, the one retreat where men and women can repair to escape from the tribulations of their daily pursuits, is an important value." *Id.* Although in public locations it is the responsibility of the individual to avoid speech that he does not wish to hear, in the home a man is entitled to close off the rest of the world. *Id.* The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality; therefore, a citizen may erect a wall around his residence that no person may penetrate without his acquiescence. *Rowan*, 397 U.S. at 737–738, 90 S.Ct. at 1491. It is this "right to be let alone" that Justice Brandeis characterized as "the most comprehensive of rights and the right most valued by civilized men." *Hill v. Colo.*, 530 U.S. 703, 717, 120 S.Ct. 2480, 2489–2490, 147 L.Ed.2d 597 (2000) (citing *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564 [(1928)] [Brandeis, J., dissenting].)

One aspect of residential privacy is the right to avoid unwanted communications. *Id.; Hill*, 530 U.S. at 716, 120 S.Ct. at 2489. Thus, the Supreme Court has repeatedly held that individuals are not required to welcome unwanted speech into their homes and that the government may protect this

freedom. *Frisby,* 487 U.S. at 485, 108 S.Ct. at 2502. The FTC's asserted interest in protecting privacy in the home is sufficiently substantial to justify a restriction in speech if the restriction fulfills the other requirements of *Central Hudson.* The Supreme Court has recognized the validity of this interest. *Rowan*, 397 U.S. at 728, 90 S.Ct. at 1484.

The FTC's asserted interest in protecting consumers from deceptive and abusive telemarketing practices is also a substantial government interest under *Central Hudson.* There is a substantial state interest in preventing deception and mistreatment of consumers. *Friedman v. Rogers*, 440 U.S. 1, 16, 99 S.Ct. 887, 897, 59 L.Ed.2d 100 (1979). Accordingly, the interest in preventing abusive telemarketing practices is sufficiently substantial to justify a restriction on commercial speech if the restriction fulfills the other requirements of *Central Hudson.*

C. Do the Amended Rules Materially Advance the Substantial Interest Articulated by the FTC?

The FTC must demonstrate that the restriction on speech will advance, to a material degree, the government's interest in protecting privacy. *Edenfield*, 507 U.S. at 770–771, 113 S.Ct. at 1792. The regulation may not be sustained if it provides only remote support for the government's purpose. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2343. This requirement is critical; otherwise, a state could restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression. *Rubin*, 514 U.S. at 487, 115 S.Ct. at 1590 (citing *Edenfield*, 507 U.S. at 771, 113 S.Ct. at 1792).

At the outset, it is important to note the parties' agreement that all telemarketing calls are invasive of privacy, whether made for commercial or charitable solicitations. (Defs.' Br. at 25.) The FTC argues that the regulations creating the do–not–call registry materially advance the government's interest in

protecting individuals from telemarketing calls they do not wish to receive, despite its limited application to only some types of commercial solicitations. (Defs.' Br. at 25–31.) According to the FTC, because there is an interest in reducing the number of unwanted telemarketing calls, every call prevented by the do–not–call registry furthers the government's interest in protecting privacy, regardless of the fact that other unwanted calls are not prevented. (*Id.* at 25.) If plaintiffs' estimates are credited, one may assume that the FTC's do–not–call registry might eliminate anywhere from forty to sixty percent of all telemarketing calls for those who subscribe, a substantial amount of unwanted calls. (Pls.' Br. at 10; Pls.' Reply at 27.) Plaintiffs counter that the registry is fatally under–inclusive because it only affects unwanted commercial calls, even though telemarketing calls seeking charitable contributions are equally unwanted and invasive of privacy. (Pls.' Br. at 38–41.) The Supreme Court dealt with similar arguments in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

In *Discovery Network*, Cincinnati prohibited news racks containing commercial handbills in order to further an asserted interest in city beautification. The city did not, however, prohibit news racks containing newspapers, which included both commercial speech and political speech. *Discovery Network*, 507 U.S. at 417, 113 S.Ct. at 1510. Noting that news racks containing commercial handbills only comprised 62 out of 2000 news racks in the city, approximately three percent (3%), the Court found that the regulation did not materially advance the city's interest in beautification. *Id.* Additionally, the court rejected the argument made by the FTC here: that *any* reduction in the number of news racks, no matter how small, furthered the city's purpose. *Id.*

The FTC has gone much farther in advancing its interest than the city did in *Discovery Network*. The assumed forty to

sixty percent reduction in unwanted telemarketing calls significantly limits invasions of individual privacy, when that percentage is compared to the paltry three percent reduction in news racks achieved by the city in *Discovery Network*. Were the under–inclusive scope of the registry the only issue relevant to whether the registry "materially advances" the FTC's interest, this court would hold that the amended Rules pass this part of the *Central Hudson* test. Unfortunately for the FTC, however, *Discovery Network*, and other first amendment cases, indicate that numerical under–inclusiveness *per se* is not the fatal defect that renders a government restriction on speech unconstitutional under the second prong of the *Central Hudson* analysis. Rather, the First Amendment imposes, not an "under–inclusiveness' limitation," but a "content discrimination" limitation. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 112 S.Ct. 2538, 2545, 120 L.Ed.2d 305 (1992).[3]

The Supreme Court has held that, to materially advance the government's interest, the government is not required to make progress on every front before it can make progress on any front. *United States v. Edge Broad. Co.*, 509 U.S. 418, 434, 113 S.Ct. 2696, 2707, 125 L.Ed.2d 345 (1993). If the government avoids regulating certain fronts in attempting to materially advance its interest, however, it cannot justify its abstention on these fronts based on the content of the speech. *R.A.V.*, 505 U.S. at 387, 112 S.Ct. at 2545. "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–649, 104 S.Ct. 3262, 3267, 82 L.Ed.2d 487 (1984). In *Discovery Network*, the Supreme Court recognized content discrimi-

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[3] Although *R.A.V.* did not involve commercial speech or *Central Hudson* analysis, its explanation of the true goal of the "under–inclusiveness" limitation in first amendment jurisprudence is equally applicable to the *Central Hudson* test.

nation as the primary flaw in the city's regulation of news racks. *Discovery Network*, 507 U.S. at 417, 113 S.Ct. at 1510. The city's regulation failed under the First Amendment because the regulation distinguished between commercial and noncommercial speech, despite the fact that there was no evidence that the commercial use of news racks was more harmful to city beautification than other uses of news racks. *Discovery Network*, 507 U.S. at 418–419, 113 S.Ct. at 1511. When a regulatory regime is pierced by content–based exemptions and inconsistencies in the government's explanation as to how the regime advances a substantial interest, it must fail under the First Amendment. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 190, 119 S.Ct. 1923, 1933, 144 L.Ed.2d 161 (1999). Simply stated, the government's practice cannot be at odds with the asserted government interest. *Id.* at 191, 119 S.Ct. at 1933. The regulation cannot distinguish among the indistinct, permitting a variety of speech that entails the same harm as the speech which the government has attempted to limit. *Id.* at 195, 119 S.Ct. at 1935.

Here, plaintiffs argue that the registry does not materially advance the FTC's interest because the FTC has made a content–based distinction between commercial and charitable solicitations for reasons unrelated to its interest in privacy. There is no doubt that unwanted calls seeking charitable contributions are as invasive to the privacy of someone sitting down to dinner at home as unwanted calls from commercial telemarketers. The FTC recognized this when promulgating the amended Rules. 68 Fed.Reg. at 4637. Realizing that its interest in privacy does not justify the distinction between commercial and noncommercial speech, the FTC attempts to justify the distinction by advancing several other arguments.

First, the FTC argues that nonprofit corporations and political fund–raisers are less likely than for–profit entities to engage in abusive practices because the consumer is both a

potential donor *and* a potential voter or volunteer for the charity or political party. (Defs.' Br. at 29.) Distinguishing between commercial and noncommercial speech may be proper when it bears a relationship to preventing commercial harms, such as fraud. *See Discovery Network*, 507 U.S. at 426, 113 S.Ct. at 1515.

This argument fails because there is no evidence in the administrative record or before this court that abusive and fraudulent telemarketing practices are more often instigated by commercial telemarketers than by charitable telemarketers. The importance of repeat business provides a commercial telemarketer with an incentive to act in a responsible and decorous manner which is as strong as the incentive possessed by a charitable telemarketer. *See Edenfield*, 507 U.S. at 776, 113 S.Ct. at 1803. Conversely, just because a corporation has made the necessary filings to achieve nonprofit or charitable status does not mean that its fund raising methods are beyond reproach. Many a mountebank has utilized the corporate form, including nonprofit incorporation, to perpetrate fraud on unsuspecting consumers. In any type of transaction where money changes hands, whether charitable or commercial, fraudulent deeds will find a foothold and pose a risk to the public. The FTC's attempt to justify its distinction between commercial and charitable solicitations on this basis, therefore, fails. Distinguishing between commercial and charitable solicitations in the telemarketing context does not materially advance the FTC's interest in curbing abusive or fraudulent telemarketing practices.

In the administrative record, the FTC indicates that it exempted charitable organizations from the do–not–call list because of the heightened First Amendment protection due charitable speech. 68 Fed.Reg. at 4586. This reasons fail under the First Amendment as a matter of law. Any attempt to distinguish between commercial and noncommercial speech

solely because of commercial speech's lesser protected status under the Constitution "attach[es] more importance to the distinction between commercial and noncommercial speech than cases warrant and seriously underestimates the value of commercial speech." *Discovery Network*, 507 U.S. at 419, 113 S.Ct. at 1511 A content–based distinction cannot be made on constitutional grounds unrelated to the asserted government interest.

Finally, the FTC argues that the amended Rules do not create a distinction between commercial and charitable speech based on content, but based on secondary effects, which is permissible. (Defs.' Br. at 20–21.) According to the FTC, the secondary effects of the calls are the constant ringing of unwanted telemarketing calls. (*Id.*) A regulation is not considered content–based if the justification for distinguishing between content is not related to the content itself, but to the secondary effects of the content. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986). Even if invasion of privacy is regarded as a secondary effect, it does not justify treating commercial speech differently from noncommercial speech, since the secondary effect is the same for both types of speech.[4]

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[4] In the administrative record, the FTC states, "as a practical matter, the Commission believes that this approach will enable charities to continue soliciting support and pursuing their missions." 68 Fed.Reg. at 4586. This statement suggests that the FTC chose to exclude non–profit corporations from the registry based on favoritism of nonprofit corporations and their missions over the objectives of for–profit corporations. Such favoritism is not a valid reason for content–based regulation. The government may not regulate speech based on hostility or favoritism towards the underlying message expressed. *R.A.V.*, 505 U.S. at 386, 112 S.Ct. at 2545. Furthermore, because the FTC did not assert this as its government interest, such favoritism cannot justify the content–based distinction in this case.

Based on the forgoing, the court finds that the FTC's do–not–call registry does not materially advance its interest in protecting privacy or curbing abusive telemarketing practices. The registry creates a burden on one type of speech based solely on its content, without a logical, coherent privacy–based or prevention–of–abuse–based reason supporting the disparate treatment of different categories of speech. *See Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir.1998). Were the do–not–call registry to apply without regard to the content of the speech, or to leave autonomy in the hands of the individual, as in *Rowan*, it might be a different matter. As the amended Rules are currently formulated, however, the FTC has chosen to entangle itself too much in the consumer's decision by manipulating consumer choice and favoring speech by charitable over commercial speech. The First Amendment prohibits the government from enacting laws creating a preference for certain types of speech based on content, without asserting a valid interest, premised on content, to justify its discrimination. Because the do–not–call registry distinguishes between the indistinct, it is unconstitutional under the First Amendment. Having held that the amended Rules fail the second part of the *Central Hudson* test, the court chooses not to address the final part of the test or to determine the now–moot issue of whether the FTC may charge a fee for obtaining the do–not–call registry.

3. Statutory Authority Under the Telemarketing Act

Plaintiffs challenge the FTC's interpretation of the Telemarketing Act and argue that the FTC does not have statutory authority to promulgate rules concerning a do–not–call registry and abandoned calls. Because the court has already addressed the amended Rules concerning the do–not–call registry and held they cannot withstand constitutional scrutiny, it need only review the amended Rules concerning abandoned calls to determine whether the FTC had authority to promulgate them.

When a court reviews an agency's construction of a statute which it administers, the court must examine two questions. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). First, the court should examine whether Congress has, in the statute, addressed the precise question at issue in the agency's interpretation. *Id.* If the intent of Congress is clear, then the court and the agency must give effect to this intent. *Id.* at 842–843, 104 S.Ct. at 2781 If, however, Congress has not directly addressed the precise question at issue, the question for the court is whether the agency's interpretation of the statute is based on a permissible construction of the statute, *Id.* at 843, 104 S.Ct. at 2781–2782. If Congress, by failing to directly address an issue, has left a gap for the agency to fill, the agency's regulations filling this gap are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 843–844, 104 S.Ct. at 2782. Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *Id.* at 844, 104 S.Ct. at 2782.

First, plaintiffs argue that the FTC's regulations regarding abandoned calls regulate the use of predictive dialers, by prohibiting abandoned calls unless telemarketers utilize "technology that ensures abandonment of no more that three percent (3%) of all calls." (Pls.' Br. at 51 [citing 16 C.F.R. § 310.4(b)(4)(i)].) Predictive dialers are machines employed in telemarketing, which use algorithms to determine the number of calls to prospective customers which may be dialed simultaneously in order to ensure that when a sales agent is finished with one call he may transfer immediately to a new call dialed by the predictive dialer. (Pls.' Br. at 49.) Using a predictive dialer allows a telemarketer's sales agents to remain on the phone perpetually without any dialing or other down time, and provides an extremely cost–effective way of doing business. (*Id.*) The use of predictive dialers, however, often results in calls being "abandoned," when

a sales agent is not available to transfer to the new call and the customer answering the telephone hears "dead air." (*Id.* at 49–50.)

Plaintiffs argue that regulation of predictive dialers, defined as "customer premises equipment" under the Communications Act, is within the sole jurisdiction of the FCC. (*Id.*) According to plaintiffs, therefore, the FTC does not have the jurisdictional authority to adopt regulations concerning abandoned calls, which affect predictive dialers. (*Id.*) The Communications Act defines "customer premises equipment" as equipment "employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications 47 U.S.C.A. § 153(14) (West 2001 & Supp.2003)." Predictive dialers qualify as "customer premises equipment" because they are employed on the premises of telemarketers to originate, route, and terminate telephone calls to potential customers. Regulation of predictive dialers, therefore, is within the jurisdiction of the FCC. The fact that the FCC has jurisdiction to regulate in an area, however, does not necessarily mean that the FTC lacks jurisdiction to regulate in the same area.

We live in an "era of overlapping agency jurisdiction under different statutory mandates." *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C.Cir.1977). Here, Congress has given both the FTC and the FCC the authority to adopt regulations effecting the telemarketing industry. 15 U.S.C.A. §§ 6101–6108; 47 U.S.C.A. § 227. Specifically, Congress gave the FTC the authority under the Telemarketing Act to promulgate rules prohibiting "deceptive or abusive telemarketing practices." 15 U.S.C.A. § 6102. Congress required the FTC to define "deceptive or abusive telemarketing acts or practices." *Id.* In the amended Rules, the FTC defines abandoning calls as an abusive act or practice and requires telemarketers to either have a sales agent available to take the call or play a message with the seller's name and telephone number. 16 C.F.R.

§ 310.4(b)(1)(iv), (b)(4)(ii). The FTC was well within its authority to enact regulations defining "abusive and deceptive telemarketing practices," since Congress expressly granted the FTC this authority in the Telemarketing Act. *Chevron*, 467 U.S. at 842–843, 104 S.Ct. at 2781 As stated earlier, if the intent of Congress is clear in the statute, then the court and the agency must give effect to this intent. *Id.*

Plaintiffs argue that, although the FTC has express Congressional authority to define "abusive and deceptive telemarketing practices," the FTC does not have the authority to define the practice of abandoning calls as one of these practices because the FCC has exclusive jurisdiction over predictive dialers. (Pls.' Br. at 51–55.) Basically, according to plaintiffs, the FTC abused its discretion in concluding that the Telemarketing Act permits the FTC to define the practice of abandoning calls as an abusive and deceptive practice. Plaintiffs cite no cases showing that the FCC has exclusive jurisdiction over the regulation of abandoned calls or predictive dialers in light of the Telemarketing Act The cases cited by plaintiffs are inapposite because they address (1) the jurisdiction of the FCC vis–a–vis the states, over interstate telecommunications and (2) the notion that the FCC regulatory scheme does not provide a basis for implied exemption from antitrust laws. *Essential Communications Sys., Inc. v. Am. Tel. & Tel. Co.*, 610 F.2d 1114, 1116 (3d Cir.1979); *Macom Prods. Corp. v. Am. Tel. & Tel. Co.*, 359 F.Supp. 973, 977 (C.D.Cal.1973). Plaintiffs' arguments do not address a situation where Congress has directly granted authority to one federal agency in an area where another federal agency already has jurisdiction, as is the case here. Based on independent research, the court finds no basis to conclude that the FCC has exclusive jurisdiction to regulate the practice of abandoning calls. Because Congress has not directly addressed whether the FTC can regulate abandoned calls, the question is whether the FTC's interpretation of the Telemarketing Act is a permissible construction of the statute.

Chevron, 467 U.S. at 843, 104 S.Ct. at 2781–2782. The FTC's regulations are to be given controlling weight because they are not arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 843–844, 104 S.Ct. at 2782. The court, therefore, holds that the amended Rules concerning abandoned calls rest on a valid interpretation of the Telemarket ing Act.

Plaintiffs seem to claim that even if the FTC could define the practice of abandoning calls as abusive and proscribe such practice under its Rules, it still could not require predictive dialers to operate at ninety–seven percent efficiency, as such regulation of technology is the FCC's domain. This argument does not bear analysis. Because the FTC has the statutory to define abusive telemarketing practices and prohibit them, the FTC has the authority under the Telemarketing Act to prohibit all abandoned calls, and, therefore, all use of predictive dialers. Instead, in order to avoid forcing the elimination of predictive dialers altogether, the FTC allowed that telemarketers could abandon up to three percent of all calls, enabling them to continue using predictive dialers. The FTC's statutory authority to do the greater certainly encompasses its authority to do the lesser. Plainly, the FTC has effectively defined abusive telemarketing as abandoning more than three percent of calls. Because the Telemarketing Act specifically grants the FTC the authority to define abusive telemarketing practices, the amended Rules pertaining to abandoned calls are within the statutory authority of the FTC under *Chevron*.

Plaintiffs argue that the FTC abused its discretion because the amended Rules concerning abandoned calls conflict with the TCPA and FCC rules. (Pls.' Br. at 55–59.) The FTC's amended Rules allow telemarketers to avoid liability for abandoning calls by playing a pre–recorded message with the seller's name and telephone number. 16 C.F.R. § 310.4(b)(4)(iii). The TCPA makes it "unlawful for any person. to

initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message" except for those calls "made for commercial purposes that the FCC determines. . will not adversely effect privacy rights . . . and do not include the transmission of any unsolicited advertisement." 47 U.S.C.A. § 227(b)(1)(B), (b)(2)(B)(ii)(I)–(II). FCC rules except from application of the TCPA's prohibition those calls made for a commercial purpose that do not include unsolicited advertisements. 47 C.F.R. § 64.1200(c).

Based on a plain reading of these provisions, under the deferential review of *Chevron*, the FTC's amended Rules do not conflict with the TCPA or the FCC's rules. A pre–recorded statement of the seller's name and phone number is made under the FTC's amended Rules as a means of identification, to prevent residents from fearing the call was made by a would–be burglar or assailant. In that sense, the pre–recorded identification message falls under the FCC's rule excepting commercial calls that do not contain any unsolicited advertisement. 47 C.F.R. § 64.1200(c). The court sees no conflict among the statute, the FCC's rules, and the FTC's rules. Accordingly, the FTC's amended Rules pertaining to abandoned calls are valid and enforceable under the Telemarketing Act.

4. Conclusion

Based on the foregoing findings and conclusions, it is ORDERED as follows:

Plaintiffs' consent motion to amend the complaint (# 34) is GRANTED.

2. Plaintiffs' motion for summary judgment (# 24) is GRANTED in part and DENIED in part. It is GRANTED as to plaintiffs' claim that the FTC's amended Rules creating a do–not–call registry are

unconstitutional under the First Amendment. It is DENIED in all other respects.

3. Defendants' motion for summary judgment (# 28) is GRANTED in part and DENIED in part. It is GRANTED as to plaintiffs' claim that the amended Rules concerning abandoned calls are invalid under *Chevron*. It is DENIED in all other respects.

4. The clerk shall enter judgment in favor of plaintiffs and against the FTC (1) enjoining the FTC from enforcing the amended Rules (issued in December 2002) creating and implementing a federal do–not–call registry and (2) dismissing with prejudice all of plaintiffs' remaining claims.

APPENDIX F

[SEAL] FEDERAL TRADE COMMISSION
RULES and REGULATIONS

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16 CFR Part 310 Telemarketing Sales Rule;
Final Rule

Thursday, July 31, 2003

FEDERAL TRADE COMMISSION

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16 CFR Part 310

Telemarketing Sales Rule Fees
AGENCY: Federal Trade Commission.
ACTION: Final rule.

SUMMARY: The Federal Trade Commission (the "Commission" or "FTC") is issuing this Final Rule to amend the FTC's Telemarketing Sales Rule ("TSR") by adding a new Section 310.8 that would impose fees on entities accessing the National Do Not Call Registry.

EFFECTIVE DATE: Section 310.8 ("the Final Fee Rule") will become effective September 1, 2003, the first day that entities engaged in telemarketing will be able to access the National Do Not Call Registry.

ADDRESSES: Requests for copies of this Final Fee Rule should be sent to: Public Reference Branch, Federal Trade Commission, Room 130, 600 Pennsylvania Avenue, NW., Washington, DC 20580. The complete record of this

proceeding is also available at that address, and on the Internet at: http:// www.ftc.gov/bcp/rulemaking/tsr/tsrrulemakingindex.htm.

FOR FURTHER INFORMATION CONTACT: David M. Torok, (202) 326-3075, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

On January 30, 2002, the FTC published a Notice of Proposed Rulemaking to amend the FTC's TSR and to request public comment on the proposed changes. 67 FR 4492 (Jan. 30, 2002) ("the Rule NPRM"). Among other provisions, the Rule NPRM proposed to establish a National Do Not Call Registry, to be maintained by the FTC, that would permit consumers who prefer not to receive telemarketing calls to register on one centralized list. On May 29, 2002, the FTC published another Notice of Proposed Rulemaking to further amend the TSR by imposing user fees on sellers and telemarketers to access the proposed registry. 67 FR 37362 (May 29, 2002) ("the User Fee NPRM"). In drafting the User Fee NPRM, the Commission was guided by the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701, and Office of Management and Budget Circular No. A-25. The Commission received 34 comments in response to the User Fee NPRM.

The Commission issued final amendments to the TSR on December 18, 2002. 68 FR 4580 (Jan. 29, 2003). Among the changes made to the TSR, the Commission adopted the proposal to establish a National Do Not Call Registry, permitting consumers to register, via either a toll-free telephone number or the Internet, their preference not to receive telemarketing calls. The Amended TSR requires telemar-

keters to refrain from calling consumers who have placed their numbers on the national registry, starting October 1, 2003, the date by which full compliance with the "do-not-call" registry provisions of the Amended TSR, 16 CFR 310.4(b)(1)(iii)(B), is required. *See* 68 FR 16238, 16245 (April 3, 2003). To comply with this requirement, telemarketers will be required to access the national registry at least once every three months to remove from their telemarketing lists the telephone numbers of those consumers who have placed their numbers on the registry. 16 CFR 310.4(b)(3)(iv). When it promulgated the Amended TSR, the Commission reserved its decision on the issues raised in the User Fee NPRM, stating that it would seek further comment in a revised Notice of Proposed Rulemaking. *See* 68 FR 4580, 4640 n. 716.

On February 20, 2003, the President signed into law the Consolidated Appropriations Resolution of 2003, Pub. L. 108-7 (2003) ("the Appropriations Act"), which appropriated funds for the operation of the FTC during fiscal year 2003. In the Appropriations Act, Congress also authorized the agency to collect fees sufficient to implement and enforce the "do-not-call" provisions of the Amended TSR. Congress further estimated the costs for fiscal year 2003 at $18,100,000. *Id.* at Division B, Title II. *See* also The Do-Not-Call Implementation Act, Pub. L. 108-10 (2003) ("the Implementation Act") at sec. 2. Pursuant to the Appropriations Act and the Implementation Act, as well as the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-08 ("the Telemarketing Act"), the FTC issued a Revised Fee Notice of Proposed Rulemaking ("the Revised Fee NPRM"). 68 FR 16238 (April 3, 2003). The Commission received 35 comments in response to the Revised Fee NPRM.[1]

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[1] A list of the commenters in this proceeding, and the acronyms used to identify each, is attached hereto as Appendix A. Comments submitted in response to the Revised Fee NPRM will be cited in this Notice as

On July 3, 2003, the Federal Communication Commission ("FCC") issued its Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("the FCC Rules").[2] Among numerous other provisions, the FCC Rules prohibit any "person or entity" from "initiating any telephone solicitation" to a "residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government."[3]

Based on its review of the record in this proceeding, and on its law enforcement experience in this area, the Commission hereby promulgates this Final Rule establishing fees for entities accessing the National Do Not Call Registry.

II. Constitutionality

Some commenters, principally ATA and DMA, contended that both the National Do Not Call Registry and its associated fees would violate telemarketers' First Amendment rights.[4] The Commission was mindful of the First Amendment implications of the national registry while amending the

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"[Acronym of Commenter]-Revised Fee at [page number]." Comments submitted in response to the User Fee NPRM will be cited as "[Acronym of Commenter]-User Fee at [page number]."

[2] The FCC Rules may be found at: http://hraunfoss.fcc.gov/edocs—public /attachmatch/FCC-03-153A1.pdf.

[3] 47 CFR 64.1200(c)(2), amended July 3, 2003.

[4] *See* ATA-Revised Fee at 1-16; DMA-Revised Fee at 6-7. *See* also ICL-Revised Fee at 5-6 (asserting simply "Given that the nondeceptive and nonmisleading telemarketing activity is protected commercial speech, the decision to charge some persons, corporate or individual, more than others with no relation to furtherance of residential privacy is unconstitutional."); DB-Revised Fee; JJ-Revised Fee; BP-Revised Fee; GS- Revised Fee; JS-Revised Fee; & SS-Revised Fee at 1-2 (individuals voicing concerns about freedom of speech).

TSR,[5] and throughout this rulemaking has carefully considered the constitutionality of the proposed Fee Rule.[6]

Relying primarily on case law addressing speech entitled to full First Amendment protection, ATA contended the Registry's fees are unconstitutional in part because by "making purchase of the list a precondition for engaging in telemarketing, the Commission has structured the list as a prior restraint on protected speech."[7] The Commission disagrees and believes that the registry fee provision is constitutional. To the extent the fee imposes a restraint on speech, it restrains only commercial speech. The Supreme Court has "observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it." *See Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 571 n.13 (1980) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 n.24 (1976)). Moreover, the Final Fee Rule ensures that the fee is collected from the telemarketing industry through procedures that safeguard against unbridled discretion in the hands of a government official or agency.[8]

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[5] *See*, e.g., 68 FR 4580, 4634-37 (January 29, 2003).

[6] To the extent that ATA and DMA challenge the constitutionality of the National Do Not Call Registry itself, and not the fee proposal, the rulemaking on the registry is closed and the parties are briefing the matter for the courts to decide.

[7] ATA-Revised Fee at 3-6. *See* also DMA-Revised Fee at 6 n.11 (contending "the Court took a dim [view of permits to engage in constitutionally protected speech whose issuance depended on the payment of a license tax because it acted as a prior restraint on speech").

[8] ATA and DMA also challenge the fee size and structure. *See,* e.g., ATA- Revised Fee at 10 (categorizing the registry's fee structure as "irrationally differentiated"); DMA-Revised Fee at 1. Because Congress's guidance on the amount of the fees to be collected and the Commission's efforts to tailor the fee structure are best understood in context, these First Amendment concerns will be addressed throughout the remaining sections of this Statement.

The registry fees are more akin to the registration fees or business licenses that are commonly imposed upon businesses before they can engage in commercial speech. A regulatory fee on speech is constitutionally permissible when it is related sufficiently to the costs of administering and enforcing that regulation.[9]

III. Access to the National Do Not Call Registry

A. Entities That Are Allowed Access

In Section 310.8(e) of the Revised Fee NPRM, the Commission proposed to allow access to the national registry by telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, and service providers acting on behalf of such persons.[10] The Commission stated that such access to the National Do Not Call Registry may be necessary to effectuate more fully the purpose of the "do-not-call" regulations; namely, to enable consumers to stop unwanted telemarketing calls. Such access would allow those entities that are exempt from the FTC's jurisdiction, but that want to scrub their calling lists as a matter of customer service, to obtain the information

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[9] *See*, e.g., *Coalition for Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1324 n.16 (11th Cir. 2000); *National Awareness Foundation v. Abrams*, 50 F.3d 1159, 1164-1168 (2d Cir. 1995).

[10] Proposed Section 310.8(e) also permitted access to the national registry by any government agency that has the authority to enforce a federal or state "do-not-call" statute or regulation. Such agencies will access information in the national registry through Consumer Sentinel, a dedicated, secure website available only to law enforcement agencies. The Commission is expanding this provision of the Final Fee Rule to allow access to the national registry to any "government agency that has law enforcement authority." This revised language more effectively mirrors the list of law enforcement agencies that currently have access to Consumer Sentinel, and that therefore will have access to the national registry data.

necessary to do so. It also would allow sellers to obtain access, as well as other entities that have traditionally provided service to the telemarketing industry. The Commission further stated that the information in the national registry should be used for no other purpose than to stop unwanted telemarketing calls. Thus, the Commission proposed that, prior to gaining access to the national registry, a person would be required to certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

A number of commenters supported the Commission's proposal to allow for such broad access to the national registry.[11] Others suggested that nonprofit organizations soliciting donations also should be allowed to access the national registry. For example, DMA noted that such access would "effectuate the purposes of the do-not-call regulations" by allowing such entities to voluntarily scrub their calling lists.[12] The Commission agrees that nonprofit organizations that wish to obtain access to the national registry to prevent calling consumers whose telephone numbers are on the registry, even though they are not required by rule to do so, should be allowed the opportunity. As a result, the Commission is amending Section 310.8(e) by eliminating the phrase "commercial purposes" from this provision, and instead allowing access to the national registry to entities "engaged in or causing others to engage in telephone calls to consumers." As previously stated, each entity will be required to certify, under penalty of law, that it is accessing the

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[11] *See* ARDA-Revised Fee at 2; BOA-Revised Fee at 1; Household-Revised Fee at 2; NCL-Revised Fee at 1 ("Entities that are exempt from the FTC's jurisdiction should not be prevented from voluntarily accessing the registry to avoid calling consumers who do not wish to receive telemarketing solicitations.").

[12] FN12 DMA-Revised Fee at 15-16. *See* also NCL-Revised Fee at 1.

registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

B. Entities Required To Pay the Fee

The Revised Fee NPRM proposed requiring each seller to pay, on an annual basis, the appropriate fee for accessing the National Do Not Call Registry prior to initiating, or causing a telemarketer to initiate, an outbound telephone call. After paying the appropriate fee each annual period, the seller would be provided with a unique account number that it could use to gain direct access to the national registry at any time during its annual period.[13] In addition, the seller could provide its account number to any telemarketer or service provider with which it does business. That unique account number would permit the telemarketer or service provider to gain access to the information to which the seller has subscribed. The Commission noted that under this revised fee structure, each seller would be charged only one time annually for access to the information included in the national registry, and would be allowed to transfer its ability to access the national registry to whatever telemarketers or service providers it wished to employ on its behalf.

A number of commenters noted that the proposed rule would require certain sellers to pay for access to the national registry, even if they do not have to gain such access under the Amended TSR.[14] Specifically, under the Amended TSR, a

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[13] As set forth in Section 310.8(d) of the Revised Fee NPRM and the Final Fee Rule, the "annual period" is defined as the twelve months following the first day of the month in which the person paid the fee. For example, a seller who pays its annual fee on September 15, 2003, has an "annual period" that runs from September 1, 2003 through August 31, 2004.

[14] *See* ABA-Revised Fee at 1; ATA-Revised Fee at 5-6; VISA-Revised Fee at 1- 2.

seller that calls only persons with whom the seller has an established business relationship, or from whom the seller has obtained the express written agreement to call, is not required to access the national registry prior to engaging in those calls.[15] Nonetheless, as proposed, the Revised Fee NPRM would require such sellers to pay the annual fee prior to making such calls. ATA described this aspect of the proposed fees as a "particularly invidious prior restraint" and thus a violation of the First Amendment because telemarketers are forced to "pay a fee even where they have no use for information in the registry."[16] As VISA noted, the FTC should "clarify in the final rule that if a seller is not required to access the registry pursuant to an exemption or otherwise, the seller should not be required to pay a user fee provided the seller does not access the registry for other reasons."[17]

The Commission agrees that sellers engaged solely in calls to persons with whom they have an established business relationship or from whom they have obtained express written agreement to call, and who do not otherwise want to access the national registry, should not have to pay an annual fee. As a result, the Commission is amending Section 310.8(a) to make clear that sellers do not have to pay for access to the National Do Not Call Registry if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to the exemptions set forth in Amended TSR §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose. A similar change is being made to Section 310.8(b), regarding telemarketer access to the national registry.

Some commenters requested clarification that sellers exempt from the Amended TSR are not required to access the

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[15] *See* 16 CFR 310.4(b)(1)(iii)(B)(i) and (ii).

[16] ATA-Revised Fee at 5-6.

[17] VISA-Revised Fee at 1-2.

National Do Not Call Registry and pay the annual fee.[18] With the adoption of the FCC Rules, the list of sellers exempt from the requirements of the National Do Not Call Registry under federal law is considerably narrowed. Any such exempt seller, however, is not required to access the national registry or pay the annual fee. For example, solicitations to induce charitable contributions via outbound telephone calls are not covered by the National Do Not Call Registry requirements of the TSR.[19] As a result, sellers involved only in such solicitations would not be required to pay a fee or access the national registry. In addition, entities engaged solely in conducting surveys are not seeking to induce the purchase of goods or services and therefore are not engaged in "telemarketing" nor subject to the TSR.[20] Similarly, political fund raising is not "telemarketing" and is not covered.[21] Of course, any of those entities may access the national registry if they voluntarily wish to prevent calling telephone numbers that are on the registry, or if they are required by other laws or regulations to gain such access.

DMA stated that nonprofit organizations voluntarily accessing the national registry to avoid calling potential

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[18] *See* FSR-Revised Fee at 1-2; VISA-Revised Fee at 1-2.

[19] 16 CFR 310.6(a). *See* also 47 CFR 64.1200(f)(9)(iii), amended July 3, 2003 (FCC Rules defining a "telephone solicitation" as not including a call or message "by or on behalf of a tax-exempt nonprofit organization."

[20] The Amended TSR defines "telemarketing" as a "plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones, and which involves more than one interstate telephone call." 16 CFR 310.2(cc).

[21] Sellers that engage solely in intrastate telemarketing, or that engage in businesses outside of the jurisdictional limitations of the FTC, are not required by the Amended TSR to access the National Do Not Call Registry or pay for such access. However, such companies are required by the FCC Rules to access the national registry and pay for such access. *See* FCC Rules at) 27.

donors who do not want to receive telemarketing calls should not be charged for such access.[22] The Commission agrees that such charges are unwarranted. Section 310.8(c) is amended to provide that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the national registry without being required under this Rule, the FCC Rules, or any other federal law.[23] Such persons must provide all information required of other entities accessing the registry, must certify, under penalty of law, that they are accessing the registry solely to prevent telephone calls to telephone numbers on the registry, and must further certify that they are accessing the registry without being required under this Rule, the FCC Rules, or any other federal law. Affording these persons such access to the registry will enable them to abide by consumers' choices not to be called by commercial telemarketers. At the same time, the certification requirement—under penalty of law—will enable the Commission to take appropriate steps against those who misuse the registry.

The Commission also proposed in the Revised Fee NPRM that telemarketers who are not also sellers—i.e., entities that engage in telemarketing only on behalf of others—would not have to pay a separate fee for their access to the national registry. Similarly, list brokers or other service providers who develop and/or scrub the calling lists for their seller-clients would not have to pay for their individual access to the national registry. Instead, such telemarketers and service providers would be required to ensure that their seller-clients have paid for access to the National Do Not Call Registry prior to initiating outbound telephone calls, or providing services, on their behalf. Telemarketers and service providers

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[22] *See* DMA-Revised Fee at 15-16.

[23] Such persons consist solely of entities engaged in outbound telephone calls to consumers to induce charitable contributions, for political fund raising, or to conduct surveys.

would gain this assurance by obtaining and using the seller's unique account number to access the national registry.

DMA opposed this "seller pays" model for the National Do Not Call Registry.[24] Instead, DMA suggested that the FTC "should leave the issue of who pays for the List to the contractual provisions between service bureaus and sellers."[25] IMC stated that a "more workable proposal would be to require each calling entity, third party or seller using in house callers to purchase and implement the list. Thus, IMC could purchase access to the registry once and call on behalf of all its clients."[26] The Commission does not believe such a system would equitably spread the fees for the national registry among all entities that engage in telemarketing. As the Commission explained in the Revised Fee NPRM, sellers are the ultimate beneficiaries of telemarketing campaigns, and covered sellers must gain access to the information in the national registry to remain in compliance with the "do-not-call" provisions of the Amended TSR. As a result, all such sellers should pay an appropriate fee for that access. Moreover, by charging only telemarketers for access to the national registry, and charging them only once for their access on behalf of multiple clients, IMC's proposed fee structure would inequitably benefit those sellers that employ a telemarketer with multiple clients. This inequitable advantage is created because those sellers would bear less of the cost of access to the same information than sellers that engage in their own telemarketing without hiring a telemarketer. Thus, the Commission will require sellers, and not their tele-

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[24] *See* DMA-Revised Fee at 7-8.

[25] *Id.*

[26] IMC-Revised Fee at 5.

marketers or service providers, to pay for access to the national registry.[27]

The FCC Rules recognize that allowing telemarketers and others to share the information obtained from the national registry "would threaten the financial support for maintaining the database."[28] In fact, the FCC Rules specifically prohibit any entity that accesses the national registry from "participat[ing] in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers."[29] The Commission agrees with the FCC, and believes such a prohibition is appropriate to include in the Final Fee Rule as well. As a result, the Commission is including similar prohibitory language in Section 310.8(c).[30]

The Revised Fee NPRM did not permit any entity, other than a seller, to purchase the list of numbers in the national registry. A number of commenters noted that telemarketers calling on behalf of exempt entities would be in the "untenable position" of being required to comply with the "do-not-call" provisions of the Amended TSR, but not having the ability to access the national registry without their exempt

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[27] The FCC Rules require all entities "making telephone solicitations (or on whose behalf telephone solicitations are made)" to "purchase[] access to the relevant do-not-call data from the administrator of the national database." 47 CFR 64.1200(c)(2)(i)(E), amended July 3, 2003. The Commission will deem all telemarketers or service providers who are not also sellers to have "purchased access" to the national registry by providing the unique account number of the seller on whose behalf the telemarketer or service provider is gaining access.

[28] FCC Rules at) 32, n.129.

[29] 47 CFR 64.1200(c)(2)(i)(E), amended July 3, 2003.

[30] Inclusion of this prohibition in the Fee Rule also will "maximize consistency" between the FTC and FCC Rules. *See* Do Not Call Implementation Act, § 3.

seller-clients having paid for access.[31] To address this potential problem, some commenters suggested allowing telemarketers direct access to the national registry.[32] Convergys, a large telemarketer commenter, described a number of other situations when telemarketers may want to subscribe to the national registry although their seller-client is not required to do so, or has already purchased the list. For example, the telemarketer may want to scrub the calling list of a client calling customers with an existing business relationship, or "to help guard against errors or omissions" in the sellers' lists and to re-verify the accuracy of those lists.[33]

For the reasons set forth in these comments, the Commission agrees that allowing independent access to the national registry by telemarketers or other service providers is appropriate. As a result, telemarketers or service providers will be allowed to gain access to the national registry on their own behalf, without being limited solely to the access allowed for their seller-clients. To maintain the fairness of the fee structure, however, telemarketers and service providers will be required to pay the appropriate fee for such independent access. Moreover, covered sellers still will be required to pay the fee prior to engaging in, or causing a telemarketer to engage in, outbound telephone calls for which access to the "do-not-call" registry is required by the Amended TSR. This "covered seller pays" requirement remains in place regardless of whether the telemarketer or service provider employed by the seller independently and voluntarily pays for access to the national registry. In addition, telemarketers and service providers paying for such independent access must certify that they are accessing the

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[31] *See* ABA-Revised Fee at 1-2; BOA-Revised Fee at 1-2; Convergys-Revised Fee at 3-5; FSR-Revised Fee at 1-2.

[32] *See* BOA-Revised Fee at 1-2; Convergys-Revised Fee at 5.

[33] *See* Convergys-Revised Fee at 2-5.

national registry solely to comply with the provisions of the Amended TSR, or otherwise to prevent telephone calls to telephone numbers on the national registry. Finally, such telemarketers or service providers are not permitted to use the information they obtain from the national registry on behalf of any entity, covered seller or exempt, unless that entity has paid the appropriate fee for access to the information or, for exempt sellers, has submitted the appropriate certification to gain access to the national registry.

C. Other Registry Access Issues

Commenters raised three other issues regarding access to the national registry. First, commenters suggested allowing sellers and telemarketers to allocate responsibility among themselves for obtaining access to the national registry. The Revised Fee NPRM anticipated that all covered sellers would initially access the national registry on their own behalf, pay the appropriate fee and acquire an account number, which they could then provide to any telemarketer or service provider that they wish to hire. Commenters noted, however, that telemarketers and service bureaus frequently access state "do-not-call" lists on behalf of their seller-clients.[34] These commenters maintained that sellers should be permitted to access the national registry either directly, or permit a third party, such as a telemarketer or list broker, to enroll and access on the seller's behalf. "In either event, a unique account number could be assigned for each seller, thereby allowing it the flexibility to change telemarketers/service providers, or use multiple telemarketers, once an access fee has been paid on its behalf."[35]

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[34] *See* ERA-Revised Fee at 3-5; MPA-Revised Fee at 4-5; West-Revised Fee at 1-2.

[35] ERA-Revised Fee at 4.

The Commission is persuaded that such flexible access is appropriate. Sellers may contract with telemarketers or other service providers to access the national registry on their behalf to satisfy the rule's requirements. In this way, sellers and their agents can allocate the responsibility for accessing the registry, although the seller remains ultimately liable for calls made on its behalf, and telemarketers remain liable for ensuring that their covered sellers have paid the appropriate fee. A unique account number still will be provided in the seller's name, for use by the seller throughout its annual period. As a result, §§ 310.8(a), (b), and (d) are amended to allow sellers to pay the annual fee "either directly or through another person."

The second issue raised by commenters regarding access to the national registry concerns the frequency of that access. Convergys stated that the fee rule should require telemarketers to access the data quarterly, regardless of the number of new clients they might acquire during that period. Telemarketers could then update their access and their registration information (with identities of new sellers) on a quarterly basis.[36] Similarly, DMA stated that it is inefficient to require a service bureau to access the registry separately in the event it signed up a new client, even though it has a current version of the telephone numbers in the registry.[37] Convergys also noted that current telemarketer systems are designed to allow telemarketers to access data directly and use it for more than one client. According to Convergys, limiting access to varying levels paid for by various clients would require significant modifications, burdens and costs.[38]

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[36] Convergys-Revised Fee at 6-8.

[37] DMA-Revised Fee at 8.

[38] Convergys-Revised Fee at 6.

The Commission never proposed requiring telemarketers or service bureaus to access the national registry or download data separately for each client. There are two requirements in effect that mandate the frequency of access to the national registry. First, § 310.4(b)(3)(iv) of the Amended TSR requires sellers and telemarketers to employ a version of the national registry obtained from the Commission no more than three months prior to the date any call is made. Second, § 310.8(a) of the revised fee rule requires sellers to pay the annual fee prior to initiating, or causing a telemarketer to initiate, outbound telephone calls to persons whose numbers are on the registry. As a result, a telemarketer need only access the national registry once every three months, assuming it can scrub all of its calling lists by using that frequency of access.[39] It can call on behalf of all of its clients during that period, scrubbing from all of its calling lists those

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[39] The Commission has developed the "do not call" rules to allow sellers and telemarketers to determine when and how frequently they need to access the national registry to remain in compliance. Unlike many state systems, the national registry is continuously updated as [consumers register. As a result, telemarketers obtain the most up-to-date list of telephone numbers each time they access the registry. This allows consumers to see a decrease in telemarketing calls from the first day they register, rather than having to wait for their numbers to be published in a quarterly list. This caused some concern for one commenter, West, that stated: "Without a defined update schedule, the potential exists for numbers to be missed in the three-month window. It takes approximately twenty to twenty-four hours to update the West system with a do-not-call registry consisting of one million records because the upload happens on a real time basis. Given this, there is the potential for a number that is added one day after West downloads the do-not-call registry to be missed in the three month window. This would require West to actually download the list more than quarterly to avoid this potential problem." West-Revised Fee at 2. It is up to the individual seller or telemarketer to determine how frequently it must access the national registry to remain in compliance with the requirement that it use a version of the registry obtained from the Commission not more than three months prior to the date any call is made.

numbers that were included in the national registry at the time the telemarketer accessed the registry. If the seller-client agrees to allow the telemarketer to use the information already in the telemarketer's files from a prior download from the national registry within the previous three months, there is no rule violation for the telemarketer to do so. In other words, telemarketers and service providers acting on behalf of sellers may use one download from the national registry on behalf of multiple clients, as long as the fee for each of the seller-clients is paid.

The third access issue raised by commenters is an objection to the requirement that telemarketers and list brokers must identify their clients when accessing the national registry. According to DMA, these "contractual relationships are proprietary information and bear no relationship to consumer privacy."[40] Convergys stated: "For any business, customer identity is inherently sensitive, proprietary data and there is no basis in the record for requiring telemarketers to disclose it routinely and in the absence of substantial complaints or other evidence to suggest there have been violations."[41] The[42] Commission understands the likely proprietary nature of these business relationships, and notes that, to the extent, if any, such information constitutes trade secrets or other confidential or privileged commercial or financial information, it would not be subject to mandatory public disclosure by the Commission. Nevertheless, this information is critical for effective law enforcement of the "do not call" registry provisions of the Amended TSR, as well as for effective collection of the required fees. Typically, consumers reporting "do-not-call" complaints will have only the name of

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[40] DMA-Revised Fee at 7-8.

[41] Convergys-Revised Fee at 5-6.

[42] *See* Freedom of Information Act Exemption 4, 5 U.S.C. 552(b)(4); FTC Act § 6(f), 15 U.S.C. 46(f).

the seller provided to the consumer during the call. As part of the investigation of such complaints, law enforcement may seek to determine whether the seller made that call on its own behalf, or used the services of a telemarketer. Information provided by sellers and telemarketers to gain access to the national registry is highly relevant to law enforcement. Querying the registry is faster, less expensive, and a potentially more reliable method of obtaining that information than traditional discovery tools, which also likely would eventually result in the disclosure of the same proprietary information. Equally important, to ensure that all sellers pay their appropriate share of the registry fees, it is critical to know the identity of each seller that pays the fee, and on whose behalf each telemarketer or service provider is accessing the national registry. Thus, the Commission will continue to require, in § 310.8(e), that if a person is accessing the national registry on behalf of other sellers, that person must identify each of the other sellers.

D. Seller and Telemarketer Liability

In the Revised Fee NPRM, the Commission proposed, in Section 310.8(a) of the Rule, to make sellers directly liable for initiating, or causing a telemarketer to initiate, an outbound telephone call without first paying the appropriate fee for access to the national registry. The Commission also proposed, in Section 310.8(b), to make telemarketers directly liable for initiating an outbound telephone call on behalf of a seller without first ensuring that their seller-clients have paid for up-to-date access to the National Do Not Call Registry. The Commission proposed imposing this liability under the authority of the Appropriations Act and the Implementation Act, in addition to the Telemarketing Act, which provides the authority for the other portions of the Amended TSR.

This proposed liability engendered a wide range of comment. For example, NCL stated: "The FTC's proposal to

hold sellers and any entities acting on their behalf directly liable for compliance with the fee requirements is absolutely crucial to prevent abuses in this regard."[43] On the other hand, IMC maintained that liability should not exist unless a seller or telemarketer calls a consumer who had placed their number on the registry. According to IMC, liability for simply failing to purchase the list is unrelated to any consumer privacy interest and is unconstitutional.[44]

As the Commission stated in the Revised Fee NPRM, direct liability on sellers and telemarketers is necessary to effectuate fairly the mandate of the Appropriations Act and the Implementation Act, which authorize the Commission to collect fees sufficient to cover the costs of implementing and enforcing the "do-not-call" provisions of the Amended TSR. Without such direct liability, the Commission remains concerned that not all entities that obtain information from the national registry will pay their fair share of the fees for that information, resulting in increased fees for those entities that do pay. The Commission continues to believe that the most effective way to ensure that all covered sellers pay their fair share of the registry fees is to impose direct liability upon them if they initiate, or cause a telemarketer to initiate, a call to a consumer without first paying the appropriate annual fee.

As for telemarketer liability, a number of commenters suggested that "where a service bureau has reasonably relied on evidence that its seller clients have paid for access, the service bureau should not be held liable for the seller's lack of compliance."[45] The Commission agrees that telemarketers

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[43] NCL-Revised Fee at 1-2.

[44] IMC-Revised Fee at 5-6.

[45] DMA-Revised Fee at 15. *See* also IMC-Revised Fee at 6 (suggesting the Final Fee Rule should "allow a telemarketer to legally rely on a seller providing a working access number as conclusive proof that the seller has properly purchased access to the registry"); ARDA-Revised Fee at 3.

can rely on the registry for proof of payment as long as that reliance is reasonable given the totality of the circumstances. If a telemarketer or list broker accesses the national registry on behalf of a seller-client and presents that seller-client's unique account number, the telemarketer will be able to determine whether the seller's account is paid up to date, and the extent of access allowed by that payment. The telemarketer or service provider may rely on that information as proof of the seller's payment.

Thus, Sections 310.8(a) and (b) continue to impose direct liability on sellers and telemarketers. The failure of a covered seller to pay the appropriate fee prior to initiating or causing another entity to initiate an outbound telephone call and the failure of a telemarketer to ensure that a covered seller has paid the appropriate fee prior to initiating an outbound telephone call on its behalf are violations of the Amended TSR, and subject the seller and telemarketer to all remedies available for such violations.

E. Corporate Divisions, Subsidiaries, and Affiliates

In the Revised Fee NPRM, the Commission proposed to treat each separate division, subsidiary, or affiliate of a corporation as a separate seller for purposes of Section 310.8. The Commission rejected comments suggesting that separate subsidiaries, divisions, or affiliates of the same corporation be treated as a single seller, stating that such treatment could greatly diminish the number of entities that will pay for access to the national registry, provide an unjust advantage to larger, multi-divisional corporations, and potentially increase the fees required to be paid by smaller, less complex corporate entities.

NCL agreed with the Commission's proposal, stating that allowing separate subsidiaries, divisions, and affiliates "to be considered as one seller, even though they would likely be conducting telemarketing campaigns for quite different

products or services, would create an inequitable situation for smaller companies and threaten the financial viability of the registry."[46] On the other hand, this proposal was significantly criticized by industry commenters.[47] They noted that companies organize into affiliated entities for tax, regulatory and historical reasons, often beyond their control.[48] For example, SBC noted that due to statutory and regulatory requirements, it would be required to pay over 44 separate annual fees, even though the services provided by its separate subsidiaries and affiliates are similar and consumers have a reasonable expectation that they are dealing with one company.[49] West stated that the proposal would cause it problems, since telemarketers such as itself would need to understand the corporate divisional structure of their seller-clients, which is not always clear.[50] In addition, a number of commenters noted that this proposal appeared contrary to the Commission's assertion, stated in the Revised Fee NPRM, that the agency did not want to charge the same company multiple times for access to the national registry.[51]

Many commenters suggested, as an alternative, that the Commission should use the "consumer expectation" factors set forth in the Amended TSR Statement of Basis and Purpose that apply to the established business relationship

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[46] NCL-Revised Fee at 2.

[47] *See*, e.g., ARDA-Revised Fee at 4; BOA-Revised Fee at 2; DMA-Revised Fee at 11-12; ERA-Revised Fee at 5-6; Household-Revised Fee at 2; IMC-Revised Fee at 5; MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4; Verizon-Revised Fee at 1-4; VISA-Revised Fee at 2.

[48] *See* BOA-Revised Fee at 2; SBC Revised Fee at 2-4; VISA-Revised Fee at 2.

[49] SBC-Revised Fee at 2. *See* also Verizon-Revised Fee at 1-4 (Verizon includes roughly two dozen separate corporations that engage in telemarketing).

[50] West-Revised Fee at 3.

[51] *See*, e.g., MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4.

exemption to determine whether separate divisions, subsidiaries, or affiliates must pay the annual fee; namely, would consumers reasonably perceive the entity as a single seller based on the nature and type of goods or services sold and the identity of the division, subsidiary or affiliate.[52] On the other hand, another commenter noted that such factors do not provide sufficient notice as to whether any particular division would be required to separately purchase access to the national registry, and that the final rule must provide "a more definitive definition of the circumstances that would subject multiple divisions to separate fee obligations."[53]

The Commission agrees that, for purposes of assessing a fee, the test to determine who must pay must be more specific and clear cut than the "consumer expectation" test established for the established business relationship exemption. The "consumer expectation" test works for determining whether a company has violated the established business relationship exemption because it is consumers themselves who will state, in their complaints, that they did not believe the company that called was related to the company with which they had done business in the past. There will be no such consumer arbiters to determine who should pay the fee. The Commission does agree, however, that those factors are appropriate ones to consider in determining which divisions, subsidiaries, or affiliates should pay a fee.

To develop a more bright line test for which entities must pay, while taking the consumer expectation factors into consideration, the Commission will require separate divisions, subsidiaries, or affiliates to pay a separate annual fee for access to the national registry under the following circumstances: (1) The entity is separately incorporated or, for a

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[52] ARDA-Revised Fee at 4; ERA-Revised Fee at 5-6; MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4.

[53] BOA-Revised Fee at 2.

non-corporate entity such as a partnership, is a similarly distinct legal entity; and (2) the entity has or markets under a different name. If the name difference reflects only a geographic distinction, that will not be sufficient to require the entity to pay a separate fee for access. For example, "ABC Marketer of Oklahoma, Inc." would not be considered a separate seller, for purposes of the Fee Rule, from its affiliate, "ABC Marketer of Texas, Inc." On the other hand, if the name difference reflects some other distinction, such as product or service, then the separately-incorporated entity would be required to pay a separate fee for access. For example, "John's Books and Games, Inc." would be considered a separate seller from its subsidiary, "John's Computers, Inc."[54]

IV. Calculation of Fees

A. Number of Entities Accessing the National Registry

The first step in establishing the appropriate fees to charge entities that access consumer telephone numbers included in the national registry is to estimate the number of such entities that would be required to pay the fee. In both the User Fee NPRM and the Revised Fee NPRM, the Commission acknowledged that this step is among the most difficult, given the dearth of information about the number of companies currently in the marketplace who make outbound tele-

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[54] The Commission does not believe these changes to the treatment of corporate subsidiaries and affiliates warrant any change to the estimate of the number of entities that will pay for access to the national registry, discussed below. There is no evidence on the record to indicate that the types of subsidiaries and affiliates which no longer will be considered separate sellers under the Final Fee Rule are numerous or widespread throughout the telemarketing industry.

marketing calls to consumers.[55] In the User Fee NPRM, the Commission determined, after examining relevant industry literature and the record in this and past TSR rulemaking proceedings, that the most pertinent information for determining the number of firms that would be required to pay the proposed user fee would be the number of firms that access state do-not-call registries. At that time, the most telemarketing firms that accessed any individual state registry was 2,932. Thus, to propose a realistic fee structure that would ensure sufficient funds would be collected to cover the costs of a national registry, the Commission estimated in the User Fee NPRM that 3,000 entities would pay for access to the information in the national registry. The Commission sought comment and evidence to determine whether this estimate was realistic and appropriate.

Of the 34 comments received in response to the User Fee NPRM, only one commenter provided any information relevant to this inquiry, stating the number of clients for which it would have to obtain access to the national registry. In addition, a second commenter provided some company-specific information. Based on these comments, the Commission proposed a new estimate of the number of firms that will access the national registry, developed through a calculation using the limited information provided in the comments, combined with relevant industry-wide data available and the Commission's knowledge of the industry. Based on this detailed calculation, set out in the Revised Fee NPRM, the Commission estimated that the total number of firms that would access the national registry would be 7,500.[56]

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[55] *See* User Fee NPRM, 67 FR at 37363-64, Revised Fee NPRM, 68 FR at 16241.

[56] *See* Revised Fee NPRM, 68 FR at 16241-42.

As the Commission stated in the Revised Fee NPRM, this calculation made a number of significant assumptions based on the best information available to the agency at that time. The Commission asked specific questions about each of these assumptions, seeking information as to their reliability. The Commission also asked commenters to provide any information they could about any and all of these assumptions, including company-specific information and data that could help the agency to refine its estimates of the number of firms that will need to access the national registry.

Once again, the Commission received virtually no comments providing information on the validity of the Commission's assumptions. One "leading teleservices company" stated that one of the Commission's assumptions—sellers that use third-party telemarketers on average employ three different telemarketers to make calls to consumers over the course of a year—was "generally accurate."[57] Two telemarketer commenters stated that most of their clients market nationwide.[58] Otherwise, the comments provided no information on this question whatsoever. Instead, the major industry association commenters faulted the Commission's calculations, claiming that they are "largely without empirical foundation,"[59] "speculative and largely unsupported" and "completely arbitrary."[60]

As previously stated, the Commission's calculations are based on the best information available to the agency at this time. Although the Commission has requested information on this issue on a number of prior occasions, the very entities that have access to such information have rebuffed the agency at every stage. The Commission has no obligation to "conduct

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[57] IMC-Revised Fee at 1, 4.

[58] *Id.* at 4-5; West-Revised Fee at 3.

[59] DMA-Revised Fee at 8.

[60] ERA-Revised Fee at 7-8. *See* also MPA-Revised Fee at 6.

a comprehensive study of the telemarketing industry" to determine the proper fees, as suggested by the DMA.[61] In fact, it has reason to doubt such a study would be productive, given the industry's ongoing reticence in this area. The Commission has undertaken substantial efforts to determine the number of entities that will be required to access the national registry. It has scoured industry literature, reviewed and analyzed numerous rounds of comments on this issue, and used its knowledge of the industry to make basic assumptions about its operation. Given this review and analysis, and the limited information provided in the comments, the Commission continues to believe that its original estimate that 7,500 entities will be required to pay for access to the national registry is reasonable and appropriate.

However, given the new FCC Rules, additional entities, originally exempt from the Amended TSR, now will be required to access the national registry. In the Revised Fee NPRM, the Commission estimated that a total of 10,900 firms engage in outbound telemarketing to consumers.[62] The Commission reduced that number to account for firms that are engaged in charitable solicitations, firms that are calling directly from sellers exempt from FTC regulation, and firms that make only intrastate calls. Of that group, after the adoption of the FCC Rules, only firms that engage in charitable solicitations remain exempt from the requirement to access the national registry. The Commission estimates that 900 entities engage exclusively in such charitable solicitations, resulting in our revised estimate that 10,000 entities will be required to access the national registry.

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[61] DMA-Revised Fee at 8-10.

[62] *See* Revised Fee NPRM, 68 FR at 16242.

B. Access by Area Code; Small Business Access

In both the User Fee NPRM and the Revised Fee NPRM, the Commission proposed a fee structure based on the number of different area codes of data that an entity wished to use annually.[63] The Commission received no comments on this issue in response to the Revised Fee NPRM. As a result, the Commission will continue to charge for access to the national registry based on the number of area codes of information an entity requests.

As for small business access to the national registry, the Commission proposed, in both the User Fee NPRM and the Revised Fee NPRM, to provide free registry access to any firm wishing to obtain data from only one to five area codes.[64] The Commission proposed such free access to limit the burden placed on small businesses that only require access to a small portion of the national registry. The Commission noted that its proposal was consistent with the mandate of the Regulatory Flexibility Act, 5 U.S.C. 601, which requires that to the extent, if any, a rule is expected to have a significant economic impact on a substantial number of small entities, agencies should consider regulatory alternatives to minimize such impact.[65] In the Revised Fee NPRM, the Commission sought comment on other alternatives that would balance the burdens faced by small businesses with the need to raise appropriate fees to fund the registry in an equitable manner, as well as on the appropriate level of free access.

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[63] *See* User Fee NPRM, 67 FR at 37364; Revised Fee NPRM, 68 FR at 16242.

[64] *See* User Fee NPRM, 67 FR at 37364; Revised Fee NPRM, 68 FR at 16243-44.

[65] *See* also Section VII, below, where the Commission determines that the instant proposed Rule would not have a significant economic impact on a substantial number of small entities.

The Commission received few comments in response to this proposal in the Revised Fee NPRM. NCL found the Commission's proposal "reasonable."[66] S&K, on the other hand, stated that the Commission should grant access to five or maybe even ten area codes for free, and "employ a graduated system that places the majority of the fees on the largest scale sellers or telemarketers, as determined by a mixture of revenues, profits, subsidiaries and overall cost structure."[67] In contrast, ATA contended that the proposed fee was unconstitutional precisely because it would impose differential treatment, shift the burden to certain sellers to pay for fees in excess of the benefits they would receive, and thus target and penalize the largest entities more than simply favor small businesses.[68] ATA also expressly warned that a fee justified largely by the gross revenue of paying sellers would not survive judicial scrutiny.[69] ARDA suggested that the Commission should make access to the first five area codes free for all sellers. According to ARDA, the "small business that purchases that sixth area code is punished by having to pay for the first five. The small-to-medium business would be less inclined to circumvent the fee requirement if it were only required to pay an incremental cost ($29) for the sixth and seventh and so forth area codes rather than $174 for one additional area code."[70]

After evaluating all of the comments received in this proceeding, the Commission continues to believe that providing access to five area codes of data for free is an

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[66] NCL-Revised Fee at 2.

[67] S&K-Revised Fee at 2.

[68] ATA-Revised Fee at 10-11.

[69] *Id.* at 12.

[70] ARDA-Revised Fee at 6. *See* also ATA-Revised Fee at 8. The FCC Rules note that thirty-three states currently have five or fewer area codes. *See* FCC Rules at) 54.

appropriate compromise between the goals of equitably and adequately funding the national registry, on the one hand, and providing appropriate relief for small businesses, on the other.[71] Moreover, the Commission is persuaded that it would be more equitable to provide all firms free access to up to five area codes, rather than to only those firms that access five or fewer area codes. It is true that a relatively small firm could need to access six area codes of data. It does not seem fair to charge that firm the full cost for all six area codes, simply because it needed access to one area code more than another small firm. The marginal cost of that sixth area code should not be so high. As a result, the Commission will provide the first five area codes of data from the national registry free to all entities that gain access. Section 310.8 of the Fee Rule is revised accordingly.

C. Fees for Access

As set forth in the Background Section of this Statement, both the Appropriations Act and the Implementation Act authorize the Commission to assess fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR, estimated at $18.1 million for fiscal year 2003. The Commission continues to anticipate that it will need to raise the entire estimated $18.1 million authorized to cover the costs associated with those efforts in this fiscal year. A number of commenters claimed that the

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[71] The Commission continues to believe, as stated in the Revised Fee NPRM, that providing small businesses with exemptive relief more directly tied to size status would not balance the private and public interests at stake any more reasonably than the approach selected. Any reduced fee schedule based on a small business' size, revenues, or profits would require a certification and determination of that status to implement and enforce, and thus would present greater administrative, technical, and legal costs and complexities than the approach selected by the Commission, which does not require proof or verification of small business status. *See* Revised Fee NPRM, 68 FR at 16243, n.52.

Commission failed to provide any indication how it intends to spend the $18.1 million, and that the costs are not justified or necessary.[72] The Commission disagrees.

As stated in the Revised Fee NPRM, costs for the National Do Not Call Registry fall primarily into three broad categories.[73] First are the actual estimated contract costs along with associated agency costs to develop and operate the national registry. This includes items such as handling consumer registration and complaints, the transfer of registration information from state lists to the registry, telemarketer access to the registry, and the management and operation of law enforcement access to appropriate information. The second category of costs relates generally to enforcement efforts. These costs will include law enforcement initiatives, both domestic and international, to identify targets and challenge alleged violators. Enforcement costs also include consumer and business education, which are critical complements to enforcement in securing compliance with the "do-not-call" provisions. The third category of costs covers agency infrastructure and administration costs, including information technology structural supports. In particular, the Consumer Sentinel system (the agency's repository for all consumer fraud-related complaints) and its attendant infrastructure are being upgraded to handle the anticipated increased demand from state law enforcers for access to "do-not-call" complaints. Further, the Consumer Sentinel system will require substantial changes so that it can handle the significant additional volume of complaints that is expected.

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[72] *See* DMA-Revised Fee at 2-6; ERA-Revised Fee at 6-7; MPA-Revised Fee at 5-6.

[73] *See* Revised Fee NPRM, 68 FR at 16244.

To raise $18.1 million this fiscal year, and assuming that 10,000 firms will pay for that access,[74] the Commission will charge an annual fee of $25 for each area code of data accessed.[75] There will be no fee charged to any entity for access to the first five area codes of data. In addition, the Commission will place a cap of $7,375 as the maximum annual fee that will be charged an entity that wants access to the entire national database. The maximum fee will now be charged for accessing 300 area codes of data or more.[76] As a

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[74] A number of commenters continued to suggest that consumers should pay a portion of the costs to implement and operate the national registry. *See*, e.g., ARDA-Revised Fee at 7; IMC-Revised Fee at 7; MPA-Revised Fee at 7; PDS-Revised Fee at 1-3. As stated in the User Fee NPRM, the Commission does not believe it is appropriate to charge consumers to protect their privacy from unwanted and abusive telemarketing calls. *See* User Fee NPRM, 67 FR at 37363. In addition, the Implementation Act clearly authorizes the Commission to raise the appropriate fees from the industry, and not from consumers.

[75] In the Revised Fee NPRM, the Commission assumed that, on average, sellers will pay to obtain information from 83 area codes of data in the national registry. *See* Revised Fee NPRM, 68 FR at 16244, n. 56. The addition of entities making intrastate calls will reduce the average number of area codes entities will pay to obtain from the national registry, as will our decision to allow all entities to obtain five area codes of data for free. As a result, the Commission is now estimating that the average entity accessing the national registry will purchase 73 area codes of data.

[76] The Commission is capping the maximum amount that will be charged for access to the entire national registry to ease the administrative burdens of operating the system and those faced by the largest users of the registry. There are currently 317 area codes included in the national registry, and more area codes are added on an irregular schedule. If there were no maximum fee for access to the national registry, every time a new area code were added, all entities that had paid for access to the entire database would be required to pay an additional fee prior to being able to download the national list. The Commission does not consider the limited additional fees that such a requirement would generate to outweigh this burden. More limited users, on the other hand, who have asked for a specific list of area codes of data, will need to change the scope of their access if they wish to obtain any newly added area codes. Because they

result of this Fee Rule, examples of fees that will be charged for various levels of access to the national registry are as follows: obtaining up to five area codes of data would have no charge; six area codes of data would cost $25; seven area codes would cost $50; thirty area codes would cost $625; two hundred area codes would cost $4,875; and access to the data from all area codes would be capped at $7,375 annually.[77]

As stated above and in the Revised Fee NPRM, these fees are based on certain assumptions and estimates. The Commission anticipates that these fees may need to be reexamined periodically and adjusted, in future rulemaking proceedings, to reflect actual experience with operating the registry.

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already will be asking for a change in their access rights, it will be less of an administrative burden to charge those entities for the additional area codes. Thus, contrary to ATA's suggestion, the cap in the proposed fee structure is sufficiently related to a consideration of the actual administrative costs of the registry to justify its use. *See* ATA-Revised Fee at 9.

[77] DMA contends that while "a nominal fee unrelated to content of the speech may be permissible under certain circumstances,". . . . "a much lower fee [than the Commission has proposed] is also needed to conform with Supreme Court First Amendment jurisprudence on monetary restrictions on speech." DMA-Revised Fee at 1-2, 6-7. *See* also ATA-Revised Fee at 15. Contrary to the DMA's comment, the fee need not be "nominal" so long as it is related sufficiently to the costs of administration and enforcement. Moreover, "[n]ominal is necessarily a relative term, to be judged by how substantial something is when [viewed in its context." *National Awareness Foundation v. Abrams*, 812 F.Supp. 431, 433 (S.D.N.Y. 1994), aff'd 50 F.3d 1159 (2d Cir. 1995). The Commission believes that the $25 fee per area code is nominal, as is the maximum fee of $7,375 for nationwide access, when considered in the context of an annual fee for members of the telemarketing industry engaged in commercial speech. Cf. *Cox v. New Hampshire*, 312 U.S. 569, 577 (1949)(upholding a fee up to $300, in 1938 dollars, for a one-day permit to engage in fully protected speech).

V. Operation of the National Registry for the Telemarketing Industry

The Commission is developing a fully-automated, secure website dedicated to providing members of the telemarketing industry with access to the registry's list of telephone numbers, sorted by area code. The first time an entity accesses the system, it will be asked to provide certain limited identifying information, such as company name and address, company contact person, and the contact person's telephone number and email address. If an entity is accessing the registry on behalf of a seller-client, the entity also will need to identify that client.

The only consumer information that companies will receive from the national registry is a registrant's telephone number. Those telephone numbers will be sorted and available by area code. Companies will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state. Of course, companies also will be able to access the entire national registry, if desired. In addition, after providing the required identifying information and paying the appropriate fee, if any, companies will be allowed to check, via interactive Internet pages, a small number of telephone numbers (less than ten) at a time to permit small volume callers to comply with the national registry requirements of the TSR without having to download a potentially large list of all registered telephone numbers within a particular area.

As previously stated, sellers, telemarketers and other service providers will be allowed to access the national registry. When a seller first submits an application to access registry information, the company will be asked to specify the area codes that it wants to access. As discussed above, each seller accessing the registry data will be required to pay an annual fee, based on the number of area codes of data the seller accesses. Fees will be payable via credit card (which

will permit the real-time transfer of data) or electronic funds transfer (which will require the seller to wait approximately three days for the funds to clear before data access will be provided). A seller must pay these fees prior to gaining access to the registry, and may do so either directly or through another entity to which the seller has provided the necessary authority.

Sellers will be able to access data as often as they like during the course of one year (defined as their "annual period") for those area codes for which they have paid. However, to protect system integrity, an account number will support a download of the entire national registry only once in any 24-hour period. If, during the course of their annual period, sellers need to access data from more area codes than those initially selected, they would be required to pay for access to those additional area codes. For purposes of these additional payments, the annual period is divided into two semi-annual periods of six months each. Obtaining additional data from the registry during the first semi-annual, six month period will require a payment of $25 for each new area code. During the second semi-annual, six month period, the charge of obtaining data from each new area code requested during that six-month period is $15. These payments for additional data would provide sellers access to those additional areas of data for the remainder of their annual term.

After payment is processed, the seller will be given a unique account number and permitted access to the appropriate portions of the registry. That account number will be used in future visits to the website, to shorten the time needed to gain access. On subsequent visits to the website, sellers will be able to download either a full updated list of numbers from their selected area codes, or a more limited list, consisting only of changes to the registry that have occurred since the company's last download. This would limit the

amount of data that a company needs to download during each visit.

Telemarketers and other service providers working on behalf of sellers may obtain access to the registry either directly or through the use of their seller-client's unique account number. If access is gained directly, i.e., the telemarketer or service provider decides to obtain the information on its own behalf, either voluntarily or to satisfy other legal requirements, that telemarketer or service provider will need to comply with all requirements placed on sellers accessing the registry, as previously discussed in this Section. Such telemarketers and service providers will be provided a unique account number that can be used only by that company, i.e., that account number will not authorize other companies to access the registry on behalf of the telemarketer or service provider. On the other hand, if telemarketers or service providers are accessing the registry through the use of their seller-client's account number, the extent of their access will be limited to the area codes requested and paid for by their seller-clients. They also will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid by their seller-clients.[78] As indicated in the Rule NPRM discussion of Section 310.4(b)(3)(iv), however, the Rule requires a seller or telemarketer to employ a version of the do-not-call registry obtained from the Commission no more than three months prior to the date any telemarketing call is made.

Data will be available from the national registry using Internet-based formats and download methods that serve both small and large businesses. Data also will be available in three different sets: full lists, change lists, and small list

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[78] Telemarketers and service providers working on behalf of sellers also will be limited to downloading the entire national registry only once in any 24-hour period.

lookups. For the full lists and the change lists, downloads may be accomplished via a web browser or a programmatic web service. For the small list lookup, a web page will allow a person to enter from one to ten telephone numbers on a form. After entering the numbers and clicking a button, the national registry will display on the web page the list of numbers entered and whether each number is in the national registry or not.

With a web browser, a person will access a secure web page that will allow the person to select: a national download (all area codes), all area codes from individual states, or individual area codes.[79] After selecting the area codes, the person will choose a flat text file or an XML tagged data file. The person also will choose a zipped or unzipped file. After making these selections, the person will click a "download" button and be prompted to save the file to his or her company computer. If the person chooses the full list, the flat file will contain just ten-digit telephone numbers, with a single number on each line. For the change list in flat file format, each line of the file will contain a telephone number, the date of the change, and an "A" (for Added) or "D" (for Deleted). The change list data will be fixed-width fields.

The alternative to web browser downloads will be programmatic web services using XML tagged data. This will assist larger companies in automating downloads of the national registry. The XML tags will include the following: a login and encrypted password; the name and email address of the company contact person; certification that access to the registry is solely to comply with the provisions of this Rule; the account number(s) for which the download is being performed; the area code of the telephone numbers to be

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[79] When new area codes are added, the "by state" display temporarily will show a new area code proximate to but separate from its state, to ensure that the new area code has been paid for.

downloaded; and whether a full list or change list is to be downloaded.

Entities that select a change list will be provided all telephone numbers that have been added to, or deleted from, the registry since the date of their previous access. Change lists, for both flat files and XML tagged data, will be available to provide changes on a daily basis (representing the additions and deletions from the day before).

The telemarketer website on the national registry will have a help desk available during regular business hours via a secure electronic form.

VI. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. ("PRA"), the Commission sought public comments on the information collection activities contained in the Final Fee Rule. *See* 67 FR 37362 (May 29, 2002); 68 FR 16238 (April 3, 2003). The Commission received no comments on its PRA analysis nor has it modified its proposal in any manner that necessitates revising its original burden estimates for the Final Fee Rule.[80] The Commission additionally sought clearance from OMB for those information collection requirements, and obtained it on July 24, 2003, under OMB Control No. 3084-0097.

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[80] While the Commission is increasing its estimate of the number of entities that must pay for access to the national registry, that increase is created by the FCC Rules, which require entities exempt from the FTC's jurisdiction to gain access. Accordingly, the paperwork burden faced by those entities will be reported by the FCC, rather than the FTC. In addition, entities that access the national registry solely because of the FCC Rules are not required to comply with the recordkeeping provisions of the Amended TSR. As a result, the increase in the Commission's estimate of the number of entities required to access the national registry does not affect that aspect of the Commission's prior PRA burden estimates.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 et seq., requires the agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") with its proposed rule, and a Final Regulatory Flexibility Analysis ("FRFA") with its final rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As explained in the User Fee NPRM, the Revised Fee NPRM, and this Statement, the Commission does not expect that its Fee Rule will have the threshold impact on small entities. Nonetheless, the Commission published an IRFA with the User Fee NPRM, and is also publishing a FRFA with its Final Fee Rule below, in the interest of further explaining its determination, even though the Commission continues to believe that it is not required to publish such analyses.

1. Reasons for Consideration of Agency Action

The Final Fee Rule has been considered and adopted pursuant to the requirements of the Implementation Act and the Appropriations Act, which authorize the Commission to collect fees sufficient to implement and enforce the "do-not-call" provisions of the Amended TSR.

2. Objectives of and Legal Basis for the Final Rule

As explained above, the objective of the Final Fee Rule is to collect fees from entities engaged in telemarketing, pursuant to the legal authority set forth in the Implementation Act and Appropriations Act.

3. Description and Estimate of Number of Small Entities Affected by the Final Rule

As explained in the Revised Fee NPRM, comments submitted by the Small Business Administration cited to information from the North American Industry Classification

System ("NAICS"), suggesting that there are 2,305 firms identified as "telemarketing bureaus," and that 1,279 of those firms may qualify for small business status, i.e., annual receipts of $5 million or less.[81] Because sellers, and not "telemarketing bureaus," constituted the relevant small entities affected by the Revised Fee NPRM, the Commission sought further public comment and information on the number of small business sellers engaged in outbound telemarketing and subject to the FTC's jurisdiction, since the NAICS classification system does not provide this level of detail.[82] The Commission received no further information in response to this request for comment. As a result, the agency is unable at this time to provide a reliable estimate of the number of affected sellers. In any event, as explained elsewhere in this Statement, the Commission believes that, to the extent the Final Fee Rule has an economic impact on small business, the Commission has adopted an approach that minimizes that impact to ensure that it is not substantial, while fulfilling the legal mandate of the Implementation Act and Appropriations Act to ensure that the telemarketing industry supports the cost of the National Do Not Call Registry.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

These requirements were discussed in the Revised Fee NPRM section regarding agency information collection activities subject to OMB approval under the PRA.[83] The information collection activities at issue consist principally of the requirement that firms, regardless of size, that access the national registry submit minimal identifying and payment

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[81] *See* 68 FR at 16246 n.65.

[82] *Id.*

[83] *See* Revised Fee NPRM, 68 FR at 16245.

information, which is necessary for the agency to collect the required fees.

Compliance requirements of the Final Fee Rule, other than information collection requirements within the meaning of the PRA, are discussed elsewhere in this document and in the User Fee NPRM and Revised Fee NPRM. In sum, as noted earlier, small entities and all other entities subject to the Final Fee Rule are required to pay and obtain access to the National Do Not Call Registry in order to reconcile their calling lists with the phone numbers maintained in the national registry.

5. Duplication With Other Federal Rules None.

6. Description of Any Significant Alternatives to the Final Rule

As discussed in the User Fee NPRM, the Commission considered a number of alternatives to the proposed fees.[84] In both the User Fee NPRM and Revised Fee NPRM, the Commission solicited comment on any significant alternatives that would further minimize the impact on small entities consistent with the objectives stated in those Notices, the Appropriations Act and the Implementation Act. As discussed elsewhere in this Statement, the Commission finds that no significant alternatives are available consistent with those objectives.

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

VIII. Final Rule

Accordingly, for the reasons set forth above, the Commission hereby amends part 310 of title 16 of the Code of Federal Regulations as follows:

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[84] *See* User Fee NPRM, 67 FR at 37367.

PART 310—TELEMARKETING SALES RULE

1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101-6108.

2. Add § 310.8 to read as follows:

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $25 per area code of data accessed, up to a maximum of $7,375; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the Registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay $25 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay $15 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency

that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the Registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

By direction of the Commission.

Donald S. Clark,
Secretary.

Appendix A

List of Acronyms for the TSR Revised Fee Proposal Commenters

Commenter—Acronym
American Bankers Association—ABA
American Resort Development Association—ARDA
American Teleservices Association—ATA
Bahe, Kevin—KB
Bank of America—BOA
Bouffard, David L.—DB
Brown, Jarrett—JB
Citigroup Inc.—Citi
Convergys Corporation—Convergys
Direct Marketing Association—DMA
Electronic Retailing Association—ERA
Financial Services Roundtable—FSR
Girty, John—JG
Goldstein, Mitchell P.—MG
Greene, Shawn—SG
Household Bank (SB), N.A.—Household
Infocision Management Corporation—IMC
Jamtgaard, O. G. Jr.—OJ
Johnson, Jeff—JJ
Lamonds, Cheryl E.—CL
Magazine Publishers of America—MPA
McGowan, Dilton—DM
National Consumers League—NCL
Phone Data Strategies—PDS
Pressley, Bob—BP
Samuels, Sara—SS
SBC Communications Inc.—SBC
Scheid, Justin & Matt Kiverts—S&K
Scott, Richey L.—RS
Smith, Jenna—JS
Stora, Christine—CS

Stutes, Gerald—GS
The Verizon companies—Verizon
VISA U.S.A.—VISA
West Corporation—West